

**Saginaw Control and Engineering, Inc. and United Steelworkers of America, AFL-CIO.** Cases 7-CA-43177(1), (2), 7-CA-43773(1), (2), (4), and 7-CA-44021(1), (2), (3)

July 11, 2003

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAMBER AND WALSH

On July 17, 2002, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

This case involves a newly certified union. The election was held on June 8, 2000, in a unit of about 223 production and maintenance employees. The Union was certified on June 16, 2000. The parties bargained from late July 2000 to June 2001, but were unable to reach an agreement. On June 18, 2001, the Respondent withdrew recognition from the Union, relying on an employee petition signed on June 13-15, 2001.

The alleged violations began during the Union's organizing campaign and continued throughout the certification year. The judge found that the Respondent unlawfully withdrew recognition from the Union and commit-

ted multiple other violations of Section 8(a)(1), (3), and (5). His recommended remedy included an affirmative bargaining order. We adopt his findings and conclusions except as set forth below.

*A. Alleged Solicitation of Employee Patrick Maziarz to Persuade Other Employees to Vote Against the Union*

The judge found that the Respondent, through its president and CEO, Fred May, violated Section 8(a)(1) by soliciting employee Patrick Maziarz to persuade other employees to vote against the Union in the June 8, 2000 election. We disagree.

On the morning of the election, May and Maziarz met to discuss Maziarz' concerns about his pay. At the end of the meeting, May brought up the subject of the Union. He expressed his opinion that a union would be bad for the Company and told Maziarz to let the other employees know to vote against the Union. Maziarz replied that the employees had already made up their minds, and telling them to vote no would only cause conflict. May then changed his mind, agreed with Maziarz, and told him not to say anything.

Under Section 8(a)(1), an employer may not "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. An employer violates Section 8(a)(1) if its conduct "would tend to coerce a reasonable employee." *Madison Industries*, 290 NLRB 1226, 1229 (1988); *Without Reservation*, 280 NLRB 1408, 1414 (1986). In determining whether an employer's statement violates Section 8(a)(1), the Board considers the "totality of the relevant circumstances." *Ebenezer Rail Car Services*, 333 NLRB 167 fn. 2 (2001); see also *John Wyke, Inc.*, 245 NLRB 9 (1979) (supervisor's statement to an employee, "when viewed in the totality of the circumstances," did not violate Section 8(a)(1)).

Under this standard, we cannot view May's initial request to Maziarz—to let other employees know to vote no—in isolation. Considering the totality of the circumstances, and placing May's request in context, we do not agree with the judge that it violated Section 8(a)(1). Almost immediately after asking Maziarz to tell others to vote no, May expressly withdrew that request. May's statements, taken as a whole, would not tend to coerce a reasonable employee in the exercise of Section 7 rights. We therefore reverse the judge and find that May did not unlawfully solicit Maziarz to persuade employees to vote against the Union.

*B. The Respondent's February 8, 2001 Letter Discussing Potential Strike*

About February 2001, the Union considered calling a strike. About February 8, 2001, the Respondent distributed a letter to employees discussing procedures in the

<sup>1</sup> There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad no-distribution rule, discriminatorily enforcing a no-solicitation/no-distribution rule, and interrogating and making coercive statements to employee James Sperry during his interviews and orientation. Furthermore, there are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(5) by unilaterally granting a wage increase, increasing the starting wage, and revising its merit evaluation system; unilaterally reducing work hours and relocating certain unit employees; and failing to provide a timely response to the Union's request for a seniority list, wage information, and a list of unit employees who had received raises since June 1, 2000. Finally, there are no exceptions to any of the unfair labor practice allegations dismissed by the judge.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge's conclusions of law, remedy, and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

event of a strike. Among other things, the letter informed employees, without further explanation, that the Respondent “will immediately take steps to *permanently* replace” strikers (emphasis in original). After several additional paragraphs discussing the cessation of employee benefits and other procedures the Respondent would follow during a strike, the letter concluded: “*Make no mistake about it—if you value your job and your continued future at Saginaw Control & Engineering you must come to work regardless of a strike!*” (Emphasis in original.)

We agree with the judge that the letter violated Section 8(a)(1), but only because we find that the letter effectively prohibited employees from striking and made a veiled threat that they would lose their jobs by doing so. We do not rely on the judge’s alternative findings that the letter unlawfully failed to distinguish between economic and unfair labor practice strikers, or unlawfully stated that the Respondent would assume that employees were participating in the strike if they did not report for work.

Permanently replaced economic strikers who make unconditional offers to return to work have the right to full reinstatement when positions become available and the right to be placed on a preferential hiring list until that time. See *Laidlaw Corp.*, 171 NLRB 1366, 1368–1370 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970). An employer may lawfully inform employees that they are subject to permanent replacement in the event of an economic strike, without fully explaining employees’ reinstatement rights under *Laidlaw*. See, e.g., *Eagle Comtronics*, 263 NLRB 515, 515–516 (1982). However, an employer must not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with *Laidlaw*. See *id.* at 516.

Pursuant to *Eagle Comtronics*, *supra*, the Respondent had the right to inform employees that they would be subject to permanent replacement in the event of an economic strike. The Respondent’s letter, however, did more. It warned each employee that “if you value your job and your continued future . . . you must come to work regardless of a strike!” Thus, the letter prohibited employees from striking and made a veiled threat that employees who did so would lose their jobs. Because the letter threatened that employees would be deprived of their rights in a manner inconsistent with *Laidlaw*, *supra*, we find that it violated Section 8(a)(1).

#### *C. Alleged Removal of Union Posters from Employee Greg Kennedy’s Locker*

The judge found that the Respondent violated Section 8(a)(1) by asking employee Kennedy to remove prounion

posters from his company locker. The judge noted that the Respondent allowed employees to display other nonwork-related materials on the lockers. For example, employees displayed posters of racecar driver Dale Earnhardt, as well as posters supporting political views or organizations such as Right to Life and the National Rifle Association.

We agree with the judge that the Respondent’s removal of the posters violated Section 8(a)(1). In doing so, we note that the Respondent discriminatorily removed union posters while allowing the other, nonwork-related posters described above. See, e.g., *J. C. Penney, Inc.*, 322 NLRB 238, 239 (1996), *enfd.* in relevant part 123 F.3d 988 (7th Cir. 1997) (respondent violated Section 8(a)(1) by removing union stickers from company-owned work cart while allowing other nonwork-related stickers). Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) by asking Kennedy to remove the prounion posters from his locker.<sup>3</sup>

#### *D. Alleged Denial of Overtime Opportunities to Employee Kennedy*

The judge found that the Respondent violated Section 8(a)(3) and (1) by denying overtime opportunities to employee Greg Kennedy because of his union activity. We reverse.

Until August 2, 2000, Kennedy worked as a local delivery driver. He regularly worked more than 40 hours per week, including occasional Saturdays. On July 31, 2000, Kennedy was suspended for 1 day for using a company truck to do personal and union business during worktime. The written discipline notice informing Kennedy of his suspension also stated: “Your position as a local driver will be reviewed by your supervisor and plant manager to determine if your poor performance warrants removal from your driving duties.” Kennedy returned from suspension on August 2, 2000. On that date, Kennedy’s supervisor, Jack Binder, notified Kennedy that he was being removed from his driving duties indefinitely. Kennedy testified that Binder told him that his new work hours were 7 a.m. to 3:30 p.m., and that he would now be classified as a “general laborer.” Similarly, Binder testified that after Kennedy was removed

<sup>3</sup> Chairman Battista and Member Schaumber agree that the Respondent violated Sec. 8(a)(1) by permitting employees to put any kind of information other than Sec. 7-related communications on company lockers assigned to them. They therefore do not reach the issue whether, absent disparate treatment, the Respondent would have to show special circumstances for requiring removal of union posters on the lockers.

In addition to the reason set forth above, Member Walsh would find that the Respondent violated Sec. 8(a)(1) because it failed to show special circumstances for requiring Kennedy to remove the union posters. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

from his driving duties, “he was then put on general labor and eight hours [per day].” After August 2, 2000, Kennedy was scheduled for, and worked, 40 or fewer hours per week.<sup>4</sup>

About September 2000, after hearing that all other employees would be required to work on a particular Saturday, Kennedy asked another supervisor, Mike Pagano, if he should work that Saturday too. After conferring with Binder, Pagano said that Kennedy knew his schedule and that he was “out.”

The General Counsel alleged two violations relating to Kennedy’s work schedule: first, that the Respondent violated Section 8(a)(3) and (1) by changing Kennedy’s driving schedule and work assignment; second, that the Respondent violated Section 8(a)(3) and (1) by denying Kennedy overtime opportunities. With respect to the change in driving schedule and work assignment, the judge found that the Respondent would have removed Kennedy from his local truck driving duties and changed his work assignment to “general labor” regardless of his union activity, because Kennedy had misused the company truck. Therefore, the judge dismissed this allegation. There are no exceptions to the dismissal.

With respect to overtime opportunities, the judge expressly declined to find that the Respondent actually had overtime hours available for Kennedy. Nevertheless, the judge found that the issue was whether Kennedy was denied the *opportunity* for overtime. Relying largely on Pagano’s comment that Kennedy was “out,” the judge found that whatever overtime the Respondent may have had available, Kennedy was not considered for it. The judge found that the Respondent violated Section 8(a)(3) and (1) by denying Kennedy daily overtime opportunities since August 2, 2000, and Saturday overtime opportunities since September 2000.

We reverse. We find that Kennedy did not receive overtime after August 2 because he had been removed from driving and placed on a fixed 8-hour schedule as a general laborer, as part of his discipline for misusing the company truck. It is clear from Kennedy’s discipline notice and the judge’s findings that Kennedy was removed from driving and reassigned to general labor because he misused the truck. There are no exceptions to the judge’s findings that this reassignment was lawful. Furthermore, it is clear from Kennedy’s and Binder’s testimony, described above, that Kennedy’s new reduced work schedule was simply one more facet of his discipline. Pagano’s statement to Kennedy that “you know your schedule and you’re out” also supports this conclu-

sion: Kennedy was “out” of consideration for Saturday overtime because he had been given a new work assignment and schedule, all as a result of his misuse of the truck. Under these circumstances, we find that the Respondent would have denied Kennedy overtime opportunities regardless of his union activity. We therefore find that the denial of overtime opportunities did not violate Section 8(a)(3) and (1).

#### *E. October 16, 2000 Performance Evaluation of Employee Kennedy*

The judge found that the Respondent violated Section 8(a)(3) and (1) by giving Kennedy a poor performance evaluation because of his union activity. For the reasons stated by the judge, we agree.

The Respondent correctly notes that Kennedy’s misuse of the company truck (for which the judge found that Kennedy was lawfully disciplined) occurred during this evaluation period. However, the written comments on Kennedy’s evaluation form do not mention the truck incident. We therefore reject the Respondent’s argument that, because of the truck incident, Kennedy would have received the same evaluation even in the absence of his union activity.

#### *F. August 4, 2000 Discipline of Employees Charles (Nick) Herzberg, Wayne Tornberg, and Maziarz for Talking*

The judge found that the Respondent violated Section 8(a)(3) and (1) by issuing written discipline to employees Nick Herzberg, Wayne Tornberg, and Patrick Maziarz on August 4, 2000, for talking. For the reasons stated by the judge, we agree. In doing so, we note that all three employees were open union supporters. Herzberg testified that he wore a union T-shirt beginning the week after the election, which took place on June 8, 2000. Tornberg was on the bargaining committee and testified that he wore union T-shirts and buttons after the election. Maziarz testified that he talked to many employees about the benefits of unionization during the organizing drive, ran for a bargaining committee position, and, just a few hours before the discipline at issue here, complained to management about an antiunion flyer that another employee had distributed in the work area. Therefore, we agree with the judge that the Respondent had knowledge of these employees’ union activity.

#### *G. Alleged Failure to Provide Information on Incidents of Discipline for Talking*

On February 23, 2001, the Union made a written request for information from the Respondent. Among other things, the Union requested documentation of all discipline for “‘talking’ or any similar offense” since January 1, 1998. The judge found that the Respondent

<sup>4</sup> About a year later, around August or September 2001, Kennedy again began working more than 40 hours per week.

violated Section 8(a)(5) and (1) by failing to provide this information.

The Respondent excepts. The Respondent argues that at the time of the request, the Union had already filed a charge alleging that the Respondent had unlawfully disciplined employees for talking. Therefore, the Respondent contends that the Union's request was an improper attempt to obtain discovery to support its unfair labor practice charge. We find merit in this exception.

An employer, on request, must provide a union with information that is necessary and relevant to carrying out its statutory duties and responsibilities in representing employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). It is well established, however, that the Board's procedures do not include pretrial discovery. For that reason, the Board has held that when information is sought that relates to pending 8(a)(3) charges, it generally will not find that a refusal to provide that information violates Section 8(a)(5). *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994), enfd. mem. in part 96 F.3d 1439 (4th Cir. 1996); *Union-Tribune Publishing Co.*, 307 NLRB 25, 26 (1992), enfd. 1 F.3d 486 (7th Cir. 1993). "Any other rule would, in effect, impose a discovery requirement where none otherwise exists." 307 NLRB at 26.

In the present case, the Union made its information request on February 23, 2001. Well before that time, the Union filed a charge, and the General Counsel issued a complaint, alleging that the Respondent had violated Section 8(a)(3) and (1) by disciplining employees Kennedy, Herzberg, Tornberg, and Maziarz. The alleged unlawful discipline of each of these employees was for talking.

By letter dated February 26, 2001, the Respondent asked the Union to explain the purpose of its information request, and asked whether the request "relate[d] to a current unfair labor practice charge." The Union responded in a letter dated March 6, 2001, acknowledging: "There is currently a charge against the company alleging that it has engaged in discriminatory application of its work rules." The letter also stated that the Union "may, or may not, introduce a proposal designed to address [the talking] issue."

At the hearing, the Union's lead negotiator testified that he requested the information because employees had been "complaining that they were being disciplined because they were involved with the union or for [no] good cause and we . . . wanted to see . . . what the flow was of discipline to all the employees so we'd have a better feel

of who was getting disciplined and if some of the claims that were being told had any validity."

Thus, the union representative essentially conceded that he requested the information to buttress claims that employees were being discriminatorily disciplined. The Union made its request at a time when a complaint had already issued alleging the unlawful discipline of four employees for talking. Under these circumstances, we find that the Union sought the information in order to support its 8(a)(3) charges. See *Pepsi-Cola*, supra, 315 NLRB 882 (based on the timing of the 8(a)(3) charge and information request, "the inference is plain that the information was sought because of its relationship to the 8(a)(3) charge"). Therefore, the Respondent did not violate Section 8(a)(5) and (1) by refusing to provide the information.

#### *H. Alleged Failure to Provide Sample Collective-Bargaining Agreements*

Also in its February 23, 2001 information request, the Union requested copies of "any first-contract, collective bargaining agreements in the manufacturing sector, of which you are aware and to which you have access, that have a duration of less than two years." The judge found that the Respondent violated Section 8(a)(5) and (1) by failing to provide this information. We disagree.

As stated above, an employer, on request, must provide a union with information that is necessary and relevant to carrying out its statutory duties and responsibilities in representing employees.<sup>5</sup> Where the request is for information pertaining to unit employees' wages, hours, and terms and conditions of employment, the information is deemed presumptively relevant, and must be provided. *F. A. Bartlett Tree Expert Co.*, 316 NLRB 1312 (1995). However, where the requested information concerns matters outside the bargaining unit, the burden is on the union to demonstrate the relevance of and necessity for the information. *Tri-State Generation & Transmission Assn.*, 332 NLRB 910 (2000); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998). Although that burden "is not an

<sup>5</sup> Our dissenting colleague argues that the Board may treat the relevance issue as conceded. We disagree. "The first question in [an information] case is always one of relevance. If the information requested has no relevance to any legitimate union collective bargaining need, a refusal to furnish it could not be an unfair labor practice." *Emeryville Research Center v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). And, as set forth above, the burden is on the General Counsel and Union to prove the relevance of the instant nonunit information. The judge found that the burden was met, and that the failure to supply the information violated the Act. The Respondent has clearly excepted to the judge's finding that its failure to provide the sample contracts violated the Act. Therefore, we find that the issue of relevance must be addressed.

exceptionally heavy one,' it does require a showing of 'probability that the desired information is relevant and . . . would be of use to the union in carrying out its statutory duties and responsibilities.'" *Tri-State*, supra (quoting *Public Service Electric*, supra at 1186).

In the present case, the Union requested sample collective-bargaining agreements "in the manufacturing sector" with a duration of less than 2 years. On its face, the requested information concerns matters outside the bargaining unit. The General Counsel, therefore, has the burden to establish that the requested information is relevant.

Contrary to our colleague, we find that the General Counsel has failed to carry that burden. The Union's request encompasses agreements between other employers and other unions, completely unrelated to the negotiations between the Union and the Respondent. The Union claimed that it needed the information because the Respondent had proposed a 1-year agreement, which the Union considered uncommon. However, there is no evidence that the Respondent, in making its proposal, claimed to have surveyed the duration of other agreements in the industry, asserted that 1-year agreements were common practice, or otherwise relied in any way on the existence of such agreements in the industry. Indeed, the Union was the party that made the claim that 1-year agreements were uncommon. If the Union asserted this claim, it presumably had the evidence to back it up. Moreover, the Union's request is not even limited to 1-year agreements, but encompasses agreements of any duration less than 2 years. Under the circumstances, the General Counsel has not proved that the requested information is relevant. We therefore find that the Respondent's failure to provide the information did not violate Section 8(a)(5) and (1).<sup>6</sup>

<sup>6</sup> Contrary to his colleagues, Member Walsh agrees with the judge that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the requested information. As the judge found, the Respondent stated in negotiations that it was only interested in a 1-year collective-bargaining agreement, which, in the experience of the Union's lead negotiator, was uncommon. The Union therefore requested information on agreements of less than 2 years' duration of which the Respondent was aware. The existence, or nonexistence, of such agreements was relevant and necessary to the Union in evaluating the Respondent's proposal. Accordingly, Member Walsh would find that the General Counsel has carried his burden to show that the information was relevant.

In any event, the Respondent appears to concede that the requested information was relevant. The Respondent contends only that it would be unfair to find the alleged violation, because the Union refused the Respondent's information request for sample agreements on certain other issues, and then settled the resulting unfair labor practice charge filed by the Respondent. Member Walsh would reject this argument for the reasons stated by the judge.

### *I. The Respondent's June 18, 2001 Withdrawal of Recognition*

On June 18, 2001, the Respondent withdrew recognition from the Union, relying on a petition and cards signed on June 13–15, 2001, by a majority of unit employees. The petition and cards stated that the employees no longer wished to be represented by the Union. The judge found that the withdrawal of recognition violated Section 8(a)(5) and (1).

We agree with the judge, for the reasons stated in his decision, that the employee petition was tainted by the Respondent's numerous unremedied unfair labor practices. These unfair labor practices would tend to weaken employees' support for the Union and cause the employee disaffection reflected in the petition. Consequently, the Respondent cannot rely on the petition as a basis for withdrawing recognition. See, e.g., *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), enfd. mem. 210 F.3d 375 (7th Cir. 2000); *Master Slack Corp.*, 271 NLRB 78, 84 (1984); *Olson Bodies, Inc.*, 206 NLRB 779, 784–785 (1973). Therefore, we agree with the judge that the withdrawal of recognition violated Section 8(a)(5) and (1).<sup>7</sup>

The judge recommended an affirmative bargaining order to remedy the unlawful withdrawal of recognition. For the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), we agree with the judge that an affirmative bargaining order is warranted. We adhere to the view, reaffirmed by the Board in *Caterair*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7

<sup>7</sup> The judge found the withdrawal of recognition unlawful for the additional reason that the employee petition was signed during the Union's initial certification year. See *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002) (employer may not withdraw recognition based on an antiunion petition circulated and presented to the employer during the certification year). Chairman Battista and Member Schaumber do not pass on this rationale.

Contrary to his colleagues, Member Walsh agrees with the judge that the withdrawal of recognition was also unlawful under *Chelsea*.

rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.” 209 F.3d at 738.

Consistent with the court’s requirement, we have examined the particular facts of this case as the court requires, and we find that a balancing of the three factors warrants an affirmative bargaining order.<sup>8</sup>

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s unlawful withdrawal of recognition. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because its status is temporary.

Moreover, we have adopted the judge’s findings that the Respondent committed numerous other unfair labor practices in addition to unlawfully withdrawing recognition. These include threatening to retaliate against union supporters; interrogating employees about their union activity; surveilling employees’ union activities and giving the impression that those activities were under surveillance; threatening employees with job loss in the event of a strike; telling employees they could no longer talk on the job in response to the union election; making various other coercive statements to employees about their union activity; maintaining an overly-broad no-distribution rule; disparately enforcing a no-solicitation/no-distribution rule; requiring an employee to remove union posters from his locker; issuing discipline and poor performance evaluations to employees because of their union activity; failing to provide the Union with a timely response to certain requests for information; and making unilateral changes in terms and conditions of employment. The Respondent’s unfair labor practices began before the union election and continued throughout the initial certification year. Therefore, employees have not yet had an opportunity to assess for themselves, without any undue interference from the Respondent, the Union’s effectiveness as collective-bargaining representative. Under these circumstances, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to fairly decide for themselves

whether they wish to continue to be represented by the Union.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent’s incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board’s resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent’s violation, because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where several of the Respondent’s unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar for a reasonable period of time is necessary in this case to fully remedy the Respondent’s unlawful withdrawal of recognition.

#### AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge’s Conclusions of Law 3, 5, 16, and 28:

“3. By maintaining in its employee handbook (at p. 25 thereof) and enforcing an overly broad no-distribution rule against its employees, the Respondent violated Section 8(a)(1) of the Act.

“5. By telling its employees in response to the Union election that they may no longer talk while working, the Respondent violated Section 8(a)(1) of the Act.

“16. By issuing a notice/letter to its employees informing them that they were required to report for work regardless of a strike if they valued their employment, the Respondent violated Section 8(a)(1) of the Act.

“28. By withdrawing recognition from the Union on June 18, 2001, the Respondent violated Section 8(a)(5) and (1) of the Act.”

2. In the judge’s Conclusion of Law 13, substitute “no-distribution” for “no-trespassing.”

<sup>8</sup> Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is “the traditional, appropriate remedy for an 8(a)(5) violation.” They agree with the District of Columbia Circuit Court of Appeals that a case-by-case analysis is required to determine if the remedy is appropriate. See *Eden Gardens Nursing Home*, 339 NLRB 71, 72–73 fns. 9 and 10 (2003). On the facts of this case, they find a bargaining order is warranted.

3. Delete the judge's Conclusions of Law 6, 20, 27, 31(d), and 31(e), and renumber the remaining paragraphs accordingly.

#### AMENDED REMEDY

In addition to the remedy provided for in the judge's decision, we shall order the Respondent to rescind the discriminatory performance evaluations issued to employees Greg Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran, remove from its files any reference to those discriminatory evaluations, and notify Kennedy, Martin, Dukarski, and Coughran that this has been done and that the evaluations will not be used against them in any way.

We shall further order the Respondent, if requested to do so by the Union, to rescind its unilateral wage increase, change in the starting wage, change in the merit evaluation system, reduction of unit employees' work hours, and relocation of unit employees. To the extent that these changes have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring the Respondent to rescind such improvements unless requested to do so by the Union.

#### ORDER

The Respondent, Saginaw Control and Engineering, Inc., Saginaw, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in its employee handbook (at p. 25 thereof) and enforcing an overly broad no-distribution rule against its employees.

(b) Threatening its employees with physical harm and unspecified adverse actions in retaliation for their sympathies, support, and activities on behalf of United Steelworkers of America, AFL-CIO.

(c) Telling employees in response to the union election that they may no longer talk while working.

(d) Coercively interrogating employees with respect to their support for the Union.

(e) Creating the impression that its employees' union activities are under surveillance.

(f) Telling employees they are or have become poor workers and bad employees because of their involvement with and support of the Union.

(g) Threatening employees with a reduction in overtime work hours and transfer to another department because of their support of or involvement with the Union.

(h) Surveilling employees and telling them that the Respondent knows of their support for the Union.

(i) Advising employees to refrain from associating with union activists.

(j) Disparately enforcing an overly broad no-solicitation/no-distribution rule against employees supportive of the Union, while not enforcing this rule against employees opposed to the Union.

(k) Coercively instructing employees not to converse with supporters of the Union and informing them that the Union would no longer represent them in the near future.

(l) Implying to employees that wearing a union T-shirt could or would have a detrimental impact on their performance evaluations.

(m) Threatening employees that if they value their jobs and their continued future with the Company, they must come to work regardless of a strike.

(n) Requiring employees to remove posters supportive of the Union from their lockers while allowing other nonwork-related posters and materials to remain posted.

(o) Discriminatorily issuing written discipline to employees in retaliation for or because of their union sympathies or activities.

(p) Discriminatorily issuing performance evaluations that adversely impact employees' opportunities for pay increases in retaliation for or because of their union sympathies or activities.

(q) Unlawfully withdrawing recognition from the Union and refusing to bargain with it as the exclusive collective-bargaining representative of the employees in the unit described below.

(r) Failing, refusing, and delaying furnishing the Union with the information requested in items 1, 2, and 3 of the Union's letter of February 23, 2001, which information is necessary and relevant to the Union's duties as the exclusive bargaining representative of employees in the unit described below.

(s) Unilaterally granting a wage increase to unit employees, increasing the starting rate for new unit employees, and revising its merit evaluation system for unit employees, without giving the Union notice and an opportunity to bargain.

(t) Unilaterally reducing the work hours of and relocating unit employees without giving the Union notice and an opportunity to bargain.

(u) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful no-distribution rule on page 25 of the employee handbook, remove the rule from the handbook, and advise employees, in writing, that the rule is no longer being maintained.

(b) Rescind the discipline issued to employee Greg Kennedy about June 21, 2000, and the discipline issued

to employees Charles (Nick) Herzberg, Patrick Maziarz, and Wayne Tornberg about August 4, 2000.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Kennedy, Herzberg, Maziarz, and Tornberg, and within 3 days thereafter notify Kennedy, Herzberg, Maziarz, and Tornberg in writing that this has been done and that the discipline will not be used against them in any way.

(d) Rescind the discriminatory performance evaluations issued to employees Greg Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran.

(e) Within 14 days from the date of this Order, remove from its files any reference to the discriminatory performance evaluations of Kennedy, Martin, Dukarski, and Coughran, and within 3 days thereafter notify Kennedy, Martin, Dukarski, and Coughran in writing that this has been done and that the evaluations will not be used against them in any way.

(f) Make Greg Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran whole, with interest, for any loss of earnings and benefits suffered by them as a result of the discriminatory performance evaluations issued to them, in the manner set forth in the remedy section of the decision.

(g) Issue nondiscriminatory performance evaluations to Kennedy, Martin, Dukarski, and Coughran, with any appropriate wage increases that may be due them effective nunc pro tunc to the date of their performance evaluations as stated in this decision, plus any applicable interest as set out in the remedy section of the decision.

(h) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees including coordinators, programmers, draftsmen, shipping clerks, warehouse employees and truck drivers employed by the Respondent at its facility located at 95 Midland Road, Saginaw, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(i) To the extent it has not already done so, provide the Union in a timely manner with the information requested in items 1, 2, and 3 of the Union's letter of February 23, 2001.

(j) If requested by the Union, rescind the changes made to unit employees' wages, the starting wage for new unit employees, and the merit evaluation system, and reinstate the terms and conditions of employment in

these areas that existed before the unlawful unilateral changes.

(k) If requested by the Union, rescind the unilateral reduction in unit employees' work hours and the unilateral relocation of unit employees, reinstate the terms and conditions of employment in these areas that existed before the unlawful unilateral changes, and make the unit employees whole for any losses attributable to its unlawful conduct, in the manner set forth in the remedy section of the decision.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Within 14 days after service by the Region, post at its facility in Saginaw, Michigan, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 20, 2000.

(n) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our employee handbook (at p. 25 thereof) and enforce an overly broad no-distribution rule.

WE WILL NOT threaten employees with physical harm and unspecified adverse actions in retaliation for their sympathies, support, and activities on behalf of United Steelworkers of America, AFL-CIO.

WE WILL NOT tell employees in response to the union election that they may no longer talk while working.

WE WILL NOT coercively interrogate employees with respect to their support for the Union.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT tell employees they are or have become poor workers and bad employees because of their involvement with and support of the Union.

WE WILL NOT threaten employees with a reduction in overtime work hours and transfer to another department because of their support of or involvement with the Union.

WE WILL NOT surveil employees and tell them that we know of their support for the Union.

WE WILL NOT advise employees to refrain from associating with union activists.

WE WILL NOT disparately enforce an overly broad no-solicitation/no-distribution rule against employees supportive of the Union, while not enforcing this rule against employees opposed to the Union.

WE WILL NOT coercively instruct employees not to converse with supporters of the Union and inform them that the Union will no longer represent them in the near future.

WE WILL NOT imply to employees that wearing a union T-shirt could or would have a detrimental impact on their performance evaluations.

WE WILL NOT threaten employees that if they value their jobs and their continued future with our Company, they must come to work regardless of a strike.

WE WILL NOT require employees to remove posters supportive of the Union from their lockers while allowing other nonwork-related posters and materials to remain posted.

WE WILL NOT discriminatorily issue written discipline to employees in retaliation for or because of their union sympathies or activities.

WE WILL NOT discriminatorily issue performance evaluations that adversely impact employees' opportunities for pay increases in retaliation for or because of their union sympathies or activities.

WE WILL NOT unlawfully withdraw recognition from the Union and refuse to bargain with it as the exclusive collective-bargaining representative of the employees in the unit described below.

WE WILL NOT fail, refuse, and delay furnishing the Union with the information requested in items 1, 2, and 3 of the Union's letter of February 23, 2001, which information is necessary and relevant to the Union's duties as the exclusive bargaining representative of employees in the unit described below.

WE WILL NOT unilaterally grant a wage increase to unit employees, increase the starting wage rate for new unit employees, and revise our merit evaluation system for unit employees, without giving the Union notice and an opportunity to bargain.

WE WILL NOT unilaterally reduce the work hours of and relocate unit employees without giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unlawful no-distribution rule on page 25 of the employee handbook, remove the rule from the handbook, and advise employees, in writing, that the rule is no longer being maintained.

WE WILL rescind the discipline issued to employee Greg Kennedy about June 21, 2000, and the discipline issued to employees Charles (Nick) Herzberg, Pat Maziarz, and Wayne Tornberg about August 4, 2000.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Kennedy, Herzberg, Maziarz, and Tornberg, and WE WILL, within 3 days thereafter, notify Kennedy, Herzberg, Maziarz, and Tornberg in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL rescind the discriminatory performance evaluations issued to employees Greg Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the discriminatory performance evaluations of Kennedy, Martin, Dukarski, and Coughran, and WE WILL, within 3 days thereafter, notify Kennedy, Martin, Dukarski, and Coughran in writing that this has been done and that the evaluations will not be used against them in any way.

WE WILL make Greg Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran whole, with interest, for any loss of earnings and benefits suffered by them as a result of the discriminatory performance evaluations issued to them.

WE WILL issue nondiscriminatory performance evaluations to Kennedy, Martin, Dukarski, and Coughran, with any appropriate wage increases that may be due them effective nunc pro tunc to the date of their performance evaluations, plus any applicable interest.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time production and maintenance employees including coordinators, programmers, draftsmen, shipping clerks, warehouse employees and truck drivers employed by us at our facility located at 95 Midland Road, Saginaw, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL, to the extent we have not already done so, provide the Union in a timely manner with the information requested in items 1, 2, and 3 of the Union's letter of February 23, 2001.

WE WILL, if requested by the Union, rescind the changes made to unit employees' wages, the starting wage rate, and the merit evaluation system, and reinstate the terms and conditions of employment in these areas that existed before the unlawful unilateral changes.

WE WILL, if requested by the Union, rescind the unilateral reduction in unit employees' work hours and the

unilateral relocation of unit employees, reinstate the terms and conditions of employment in these areas that existed before the unlawful unilateral changes, and make the unit employees whole for any losses attributable to our unlawful conduct.

SAGINAW CONTROL AND ENGINEERING,  
INC.

*Gary Saltzgiver and Dynn Nick, Esqs., for the General Counsel.  
E. Louis Ognisanti, Esq. (Braun Kendrick, Finkbeiner, P.L.C.),  
of Saginaw, Michigan, for the Respondent.*

## DECISION

### STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me on November 7, 8, and 9, 2001, and January 15 and 16, 2002, in Saginaw, Michigan, pursuant to an original charge in Case 7-CA-43177(1) filed on June 20, 2000, by the United Steelworkers of America, AFL-CIO (the Union) against Saginaw Control and Engineering, Inc. (the Respondent); an original charge in Case 7-CA-43177(2) filed by the Union against the Respondent on August 23, 2000; an original first amended charge in Case 7-CA-43177(1) filed on September 22, 2000, by the Union against the Respondent; and an original second amended charge in Case 7-CA-43177(1) filed on October 30, 2000, by the Union against the Respondent. On October 31, 2000, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued an order and consolidated complaint and notice of hearing based on the aforementioned charges.<sup>1</sup>

On February 22, 2001, the Union filed original charges in Case 7-CA-43773(1) and an original charge in Case 7-CA-43773(2) against the Respondent; an amended charge in Case 7-CA-43773(2) was filed by the Union against the Respondent on April 17, 2001.

On May 24, 2001, an original charge in Case 7-CA-43773(4) was filed by the Union against the Respondent. An original charge in Case 7-CA-44021(2) and an original charge in Case 7-CA-44021(3) were filed on June 12 and 21, 2001, respectively, by the Union against the Respondent. On June 29, 2001, the Regional Director for Region 7 issued an order consolidating these aforementioned cases in a second amended consolidated complaint and notice of hearing. On August 31, 2001, the Regional Director for Region 7 issued his order consolidating these cases, a third amended consolidated complaint and notice of hearing. On September 28, 2001, the Regional Director for Region 7 issued his order consolidating cases, a fourth amended consolidated complaint and notice of hearing.<sup>2</sup>

<sup>1</sup> The hearing on these consolidated cases was postponed by the Regional Director on January 30, 2001, and a new hearing date was set.

<sup>2</sup> At the hearing, the General Counsel moved to amend par. 25 of the fourth amended consolidated complaint to include a reference to par. 22. There was no objection by the Respondent's counsel, and inasmuch as the amendment was merely to correct a clerical omission, I granted the motion. The General Counsel filed a motion to correct transcript on March 28, 2002. The Respondent filed its response to

All references to the complaint in this matter will refer to this last amended and consolidated complaint.

The fourth amended complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an overly broad no-solicitation rule; threatening employees with adverse actions in retaliation for engaging in union activities; telling employees not to discuss the Union during working hours; soliciting employees to persuade other employees to vote against the Union; coercively interrogating employees with respect to their support of the Union; creating an impression among its employees that their union activities were under surveillance; stating to employees that union supporters were disloyal and poor workers; threatening employees with written discipline and reduction of overtime because of their support for the Union; surveilling employees to discover union supporters; advising employees to refrain from associating with union supporters; coercively stating its negative reaction to the filing of charges by the Union with the Board; disparately enforcing its overly broad no-solicitation rule against union supporters; coercively informing employees that the Union would no longer represent them; implying to employees that wearing union T-shirts would have a detrimental effect on their performance evaluations; informing employees that they were required to work during a strike if they valued their jobs, and that employees' failure to report for work during a strike and/or participate in picketing would be considered being on strike and would subject them to permanent replacement; disparately requiring union supporters to remove posters supportive of the Union while allowing other posters to remain posted; and lending its support to an effort to solicit employees' signatures in support of a petition to decertify the Union.

The consolidated complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily and retaliatorily changing the driving schedules and regular work assignments of and issuing written disciplines to employee Gregory Kennedy; issuing written discipline to employees Nick Herzberg, Pat Maziary, and Wayne Tornberg; denying daily and Saturday overtime work opportunities to Kennedy; issuing performance evaluations adversely affecting opportunities for a pay increase to employees Ronald Martin, Derek Dukarski, Steve Coughran, Scott Cronkright, and Kennedy.

The consolidated complaint also alleges that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition of the Union and advising the Union that it would no longer engage in collective bargaining with the Union, based on decertification petitions coercively solicited in the presence of a supervisor and solicited and signed by unit employees prior to the expiration of the certification year in a Board representation case,<sup>3</sup> and in spite of the existence of unremedied unfair labor practices as alleged in the complaint; by reducing the working

hours of and relocating certain unit employees; and by refusing to furnish the Union with certain information deemed relevant and necessary to the Union's performance of its collective-bargaining duties.

The Respondent timely filed answers in which, while admitting to some aspects of the charges, generally denied violating the Act in any way.

On the entire record, including my observation of the demeanor of witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a Michigan corporation, with an office and place of business at 95 Midland Road, Saginaw, Michigan, has been engaged in the manufacture and nonretail sale of electrical control boxes. The Respondent admits, and I find, that in conducting its business operations during each of the calendar years ending December 31, 1998, and December 31, 2000, it derived gross revenues in excess of \$500,000. The Respondent admits, and I find, that in conducting its business operations during each of the calendar years ending December 31, 1999, and December 31, 2000, it purchased and received at its Saginaw facility goods valued in excess of \$50,000 directly from points outside the State of Michigan. The Respondent further admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED AND THE APPROPRIATE UNIT OF EMPLOYEES

The Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The Respondent admits, and I find, that the following employees engaged its Midland Road facilities constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time production and maintenance employees including coordinators, programmers, draftsmen, shipping clerks, warehouse employees and truck drivers employed by [Saginaw Control and Engineering] the Respondent at its facility located at 95 Midland Road, Saginaw, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

##### III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

###### A. Background Facts

The Respondent operates as a fabricator of electrical control enclosures and precision sheet metal products, such as beverage and food vending cabinets. Its main facility is located in Saginaw, Michigan. Fred May serves as president and chief executive officer for the Company, and Jerry Simms is the plant

General Counsel's motion to correct transcript on April 3, 2002. The Respondent opposed the corrections requested by the General Counsel in only one particular which will be discussed later in this decision. I have otherwise granted the General Counsel's motion.

<sup>3</sup> The representation case is described in the consolidated complaint as Case 7-RC-21809.

manager of the Saginaw facility.<sup>4</sup> The Respondent employs about 275 employees of which 235 are hourly workers. The Respondent's hourly workers are assigned to various departments and perform welding, laser cutting, painting, assembly, and packing and shipping functions. Each department is headed by a shift supervisor. The Respondent operates on a two-shift basis. The first shift begins at 6:30 a.m. and ends at 3:30 p.m.; second shift hours are 3:30 p.m. to 11:30 p.m.

The Respondent has continuously maintained an employee handbook since about October 1999.<sup>5</sup> This handbook, distributed or otherwise made available to all employees when they are initially hired, provides general background of the Company's policies and procedures as well as a listing of specific work rules and benefits.

In January or February 2000, the Union initiated a campaign to organize the Respondent's hourly work force. Shortly after the commencement of this campaign, certain employees, with the Union's assistance, formed a plant organizing committee. Committee members distributed literature around the plant, held off-premises meetings with employees, and distributed and collected union authorization cards. Employee Gregory Kennedy was a major player in the organizing effort.

The Respondent became aware of the organizing campaign early on and in response retained the services of a labor management consulting firm and took various steps to oppose the Union's efforts.<sup>6</sup>

On April 28, 2000, the Union filed a petition for certification of representation in Case 7-RC-21809<sup>7</sup> and, on June 8, 2000, an election was held which the Union won.<sup>8</sup> On June 16, 2000, the Board certified the Union as the exclusive bargaining representative of the Respondent's employees and determined the appropriate unit of the employees.

Shortly after the Board's certification, the Union held elections among the unit employees for positions on the newly established bargaining committee. Around July 24-26, 2000, the Union and the Respondent commenced a series of negotiating sessions to arrive at a collective-bargaining agreement. At the initial session, the Respondent was informed by the Union that certain of the employees, namely Greg Kennedy, Michael

Leach, and Wayne Tornberg,<sup>9</sup> were duly elected members of the Union's bargaining committee; that Robert Madden, the Union's staff representative, would be the lead negotiator. The Respondent advised the Union that management's team would be composed of May, Sims, and its attorney, Robert Kendrick. The parties engaged in several negotiation sessions but were unable to arrive at an agreement; the last bargaining session took place on about June 12, 2001.

On June 18, 2001, relying on petitions and individually signed cards submitted by 154 of 223 bargaining unit employees who indicated their desire not to have the Union represent them, the Respondent, by letter, withdrew recognition of the Union and advised the Union that it would no longer engage in collective-bargaining negotiations with it.

#### *B. The 8(a)(1) Allegations*

The complaint in paragraph 8 contains in 12 subparagraphs (a-1), separate violations of Section 8(a)(1) of the Act. I will be discussing these violations in terms of whether the alleged unlawful act occurred prior to or after the election.

##### *1. The preelection allegations*

###### *a. The Respondent's no-distribution rule (subparagraph 8(a))*

The complaint alleges that since around October 1999, the Respondent has maintained in its employee handbook and enforced an overly broad no-distribution rule.

The allegedly offending rule appears at page 25 of the handbook and states, among other working rules:

Distributing written or printed matter of any description on company premises without written management permission.<sup>10</sup>

The General Counsel contends that this rule, in effect, unlawfully bars any distribution of union literature by employees in nonworking areas of the plant during worktime without management's prior authorization. He further argues that the Respondent enforced this rule and cites an example, an incident taking place in August 2000 wherein three employees were accused of trespassing, while attempting to distribute notices of a union meeting in the company parking lot, and ordered off the premises.<sup>11</sup>

The Respondent counters, arguing that its no-distribution rule is not overly broad, because it is modified, ameliorated, and circumscribed by a corresponding solicitation and distribu-

<sup>4</sup> The Respondent admits, and I find that, May and Simms are supervisors and/or agents of the company within the meaning of Sec. 2(11) and (13) of the Act.

<sup>5</sup> The handbook is contained in GC Exh. 34.

<sup>6</sup> May testified that he became aware of the organizing campaign around February 2000 when organizers appeared at the entrances of the plant and passed out literature. May identified the consulting firm of Craft Barrasi as the entity hired by the Company to guide it through the campaign. May stated that the firm instructed management on the dos and don'ts of the electoral process and specifically instructed that supervisors should not threaten, interrogate, make promises, and surveil employees. May stated that he convened a meeting with the employees, with the Craft Barrasi personnel in attendance, in which he provided information about the election process, made a presentation about company benefits, and received and answered questions from the employees.

<sup>7</sup> See GC Exh. 2.

<sup>8</sup> See GC Exh. 3, the tally of ballots.

<sup>9</sup> Tornberg left the Company around December 2000 and was replaced on the committee by Nick Herzberg.

<sup>10</sup> See GC Exh. 34, which includes the handbook in its entirety. The Respondent admits that the language of the rule is contained in the handbook and that it has been in existence since around October 1999. I note that the handbook includes a page whereon the employee acknowledges having read and understood the handbook and contains a place for his or her signature. I credit May's testimony that all employees are either given a copy of the handbook or that it is otherwise made available to them before they commence employment with the Respondent.

<sup>11</sup> This incident serves as a separate charge of a violation of Sec. 8(a)(1) in the complaint and will be discussed later under a separate section.

tion rule located at page 18 of the handbook. This section entitled "Solicitation and Distribution" in pertinent part states:

Soliciting of any kind, during working time, is not permitted. Working times does not include paid breaks, but only paid time when work is expected of you.

The distribution of literature or items in a manner which litters is not permitted.

Thus, the Respondent argues that any purported overbreadth of its distribution policy is cured by the limitations of this latter provision.

However, the Respondent admits that certain of its supervisors on the one occasion in August 2000 did erroneously enforce the rule on page 25 without consideration of its page 18 counterpart, when they forbade employees from distributing literature in the company parking lot after completion of their shift in the company parking lot. The Respondent submits that this was a singular event and that there was no proof adduced by the General Counsel that it would not otherwise grant employees permission to distribute material if requested. Accordingly, the Respondent suggests that an appropriate remedy here would be to order it to enforce its no-distribution rule on page 25, but only in conjunction with the modification thereof on page 18 of the handbook.

As noted by the General Counsel, the Board in *Bay Metal Cabinets*, 302 NLRB 152 (1991), affirmed the judge's determination that a no-distribution rule virtually identical to the one at issue here on page 25 of the handbook was overbroad. As such, in my view, *Bay Metal* is on point here and, based thereon, a violation could be found. However, the Respondent claims that its allegedly offending rule has been mitigated and/or corrected, as it were, by the page 18 modification, factually a point not covered by the Board in *Bay Metal*.

I have considered the Respondent's argument and would conclude that the no-distribution rule on page 25, even when read together with the no-solicitation rule on page 18 of the handbook, is unlawful as overly broad because the rule requires employees to seek written permission from management to engage in protected activity—either soliciting or disturbing materials—while (anywhere) on company property, irrespective of whether the distribution takes place in breakrooms, lunch areas, or in the parking lot. That the Respondent's rule on page 18 arguably purports to rein in the reach of the page 25 rule to working time, defined as when work is expected of employees, and work areas; nonetheless, employees must obtain written permission to engage in otherwise protected activity. The Board law is clear, employees do not need the Respondent's permission, written or otherwise, to engage in protected activities. *Brunswick Corp.*, 282 NLRB 794, 798 (1987); and *Baldor Electric Co.*, 245 NLRB 614 (1979). Accordingly, this rule may not stand, as it violates, in my view, Section 8(a)(1) of the Act. I would find a violation of the Act.

*b. Romanelli's April 20 threats of retaliation  
(subparagraph 8(b))*

The Respondent, as alleged in the complaint, through one of its admitted agents/supervisors, Vince Romanelli, threatened

employees with unspecified adverse actions in retaliation for their union activities and support.

Testifying in support of this charge was former welding department employee, Matt Heimberger.<sup>12</sup> Heimberger stated that on April 20, around his last 2 weeks with the Respondent, while working the second shift, he and his supervisor, Romanelli, were engaged in general conversation; at some point, Romanelli directed the conversation to the Union's ongoing organizing efforts at the plant. According to Heimberger, Romanelli indicated that management was having problems with the Union which led Romanelli to voice his opinion about some of the employees who supported the Union. One employee mentioned by Romanelli was Greg Kennedy. According to Heimberger, Romanelli said Kennedy was one of the biggest problems with the union effort, that Romanelli wished he could just kick Kennedy's ass and get him fired. Heimberger also stated that Romanelli mentioned other employees who he thought supported the union cause, but was unsure where they stood on the Union. According to Heimberger, Romanelli said he would try to convince these employees to be procompany or (failing that) find a way to fire them and eliminate the Union as a problem.

The Respondent called Romanelli to rebut these charges.<sup>13</sup>

Romanelli testified that he knew Heimberger, whom he supervised, but only vaguely, as Heimberger was a short-term employee. Romanelli recalled having a discussion at his desk with Heimberger in April 2000 in which Heimberger expressed his desire to transfer from the second shift to first shift. According to Romanelli, Heimberger offered to give Romanelli information about the involvement of certain employees with the Union in exchange for a transfer to first shift. Romanelli stated that he told Heimberger he was not interested in the proposition. Romanelli stated that in spite of his rejection of the proposition, Heimberger mentioned the names of certain employees who were supposedly involved in the union effort.<sup>14</sup> Romanelli said that Kennedy was not mentioned by Heimberger in this conversation. Romanelli said that he did not in calendar year 2000 supervise Kennedy, who did not come under his direct supervision in the assembly department until August 2001. Romanelli specifically denied saying to anyone that he wanted to do anything physical to Kennedy or any other employee. Romanelli claimed that although he knew some of the employees who supported the Union, he did not know at the time of his conversation with Heimberger that Kennedy supported the Union.

<sup>12</sup> Heimberger worked for the Respondent from around November 1999 through a period in April 2000 on the first shift and later to the second shift. According to Heimberger, he voluntarily left the Respondent's employ for a better job.

<sup>13</sup> Romanelli has been employed by the Company for about 8 years. At the time of the hearing, he supervised the assembly department. During calendar year 2000, Romanelli was a supervisor in the welding department.

<sup>14</sup> Notably, Heimberger stated that Romanelli named James Brabau, Walter French, and a few other employees whom Romanelli said he would either persuade to the employer's side or try to fire. Romanelli said that Heimberger disclosed employees Brabau, Keith Nephew, Pat Chupp, and Scott Langhorne as union supporters.

Resolution of this allegation depends in the main on resolving the credibility issues presented by the conflicting testimony of Romanelli and Heimberger.

The Respondent argues that Romanelli's version of the April 2000 conversation should be credited over Heimberger. The Respondent essentially portrays Heimberger as a person who was disloyal to the Union when employed at the Respondent's plant; then departed for a job with a union employer. The Respondent submits that at the hearing, expecting to have his disloyalty exposed, Heimberger provided factually inaccurate testimony to cover his perfidy.

The General Counsel contends that Heimberger's account of the conversation is the more plausible and, therefore, should be credited, especially when considered with the totality of Romanelli's antiunion behavior and attitude with respect to other employees and incidents in this litigation.

I agree with the General Counsel and would credit Heimberger's version of their accounts over that of Romanelli. I note that, indeed, it seems implausible that Heimberger would, as Respondent put it, "rat out" the union supporters to get a transfer to the first shift. First, there was no testimony adduced suggesting that Heimberger was unhappy with his second-shift assignment in April 2000. It seems to me that Heimberger evidently had made plans to leave the Respondent's employ, and a transfer to the first shift would be meaningless. Also, while the Respondent criticizes Heimberger's letter<sup>15</sup> prepared at the behest of Kennedy in August for lack of completeness, it nonetheless generally corroborates Heimberger's testimony. Heimberger testified, in my mind, forthrightly and sincerely, and in my view, truthfully. Having credited Heimberger's version of the conversation with the Respondent's agent and supervisor, I conclude that the Romanelli statements constituted unlawful threats to harm physically an employee and retaliate against other employees because of their support for the Union, in violation of the employee's rights guaranteed by Section 7 of the Act. *Medic One, Inc.*, 331 NLRB 464 (2000).

*c. Fred May's June 8, 2000 solicitation  
(subparagraph 8(d))*

The complaint alleges that on June 8, 2000, the Respondent's president and chief executive officer, Fred May Jr., solicited an employee to persuade other employees to vote against the Union. The General Counsel called current employee Patrick Maziarz<sup>16</sup> to establish this charge.

Maziarz testified that once he became aware of the Union's organizing campaign, he took an active interest in the effort, including attending union meetings, signing an authorization card, talking to a "lot of employees about the benefits of unionism," and otherwise explaining to them his reasons for supporting the union cause.

Maziarz stated that the day before the election (June 7, 2000), Fred May, accompanied by one of the consultants hired

by the Company, held a meeting with the employees and, using charts, spoke to them about the benefits, specifically raises given to all employees the previous year that the Respondent had provided to them. According to Maziarz, he responded to the remark by telling May that he for one had not received a raise.<sup>17</sup> May thereupon told him he would look into the matter. Maziarz said that the next day in the morning (around 8–9 a.m.) before the election,<sup>18</sup> May called him to May's office and discussed the raised issue with him. According to Maziarz, May presented a chart individualized for him indicating specifically the increases Maziarz had received yearly and the dates on which he received them. Maziarz stated that May further advised him that he (Maziarz) would have to do more to get a true merit raise as opposed to the general cost of living increases accorded to all employees.

Maziarz stated that, after covering the raise issue, May then directed the conversation to another topic. According to Maziarz, May said that employees have left the Company to work for other companies, but merely wind up getting laid off in 89 days (presumably just shy of completing a 90-day probation period). According to Maziarz, May told him that his (Maziarz) best bet would be to stay with the Respondent, that he had never been laid off and would not be laid off, that he should not worry about layoff.<sup>19</sup> May also said, according to Maziarz, that a union would be bad for the Company and if those guys want a union, they can start their own damn company—have their own union. Maziarz stated that May then said that when he went back to work to tell the employees to vote no or against the Union.<sup>20</sup> Maziarz said that he told May that the workers already had their minds made up and if he were to tell them to vote no, this was just going to cause more conflict and problems on the job. According to Maziarz, May agreed with him and said to keep your mouth shut and don't say anything. Maziarz thereupon returned to work.

<sup>17</sup> Maziarz stated that he told May that he had not, in fact, received a raise the last year and the year before.

<sup>18</sup> The election was scheduled for around 2–3 p.m. that day.

<sup>19</sup> Maziarz acknowledged that some of the persons who leave for the prospect of greener employment pastures do, in fact, get laid off in the fashion described by May.

<sup>20</sup> Maziarz, on direct examination at Tr. 591, LL. 22–23, is quoted "[a]nd when you go back to work, let the other employees to vote no for the Union." Maziarz also at Tr. 606, LL. 21–22, on cross-examination, said, "[a]nd when you go back to work, let the employees to vote no for the Union." The General Counsel, in his motion to correct transcript, requests the word "know" to be inserted between the words "employees" and "to" in both places. The Respondent, in its opposition to the motion, argues that the requested insertion would totally change the meaning of Maziarz' testimony, and that it is unlikely the court reporter would repeat a "mistake" twice. The Respondent submits the requested correction is simply an attempt by the General Counsel to obtain a more favorable reading of the transcript.

I have concluded that the transcript will remain uncorrected in these places. Based on my recollection of Maziarz' testimony, including his demeanor, inflection, and context on the point, I have concluded also that irrespective of what is printed in the transcript, the gist of Maziarz' testimony is that May told him to "tell" the employees to vote no, or against the Union.

<sup>15</sup> See R. Exh. 15. Heimberger wrote a short "to whom it may concern" letter memorializing his conversation with Romanelli. This letter is undated.

<sup>16</sup> Maziarz has been working for the Respondent for around 16-1/2 years, the last 7 of which as a job processor and data entry worker. Maziarz works the first shift.

May testified about the meeting with his assembled employees and acknowledged that among the several June 2000 meetings he had with the employees prior to the election, was one occurring on June 7 which covered a presentation on company benefits, including general or blanket pay increases given by the Company in past years to the workers. According to May, the June 7 meeting followed his usual format of presenting information regarding benefits, utilizing a flip chart which showed current company-provided benefits and a history of pay increases at the plant. At the end of the presentation, employees, as was customary, were allowed to ask questions. May acknowledged he was asked by Maziarz about the raises given employees. According to May, Maziarz stated that he had not received a raise in 3 years. May said that he could not accept this as fact and said he told Maziarz that he would get back with him on this matter.

According to May, he investigated Maziarz' complaint and later that day prepared a chart of Maziarz' wage history at the plant for the period covering April 1985 through October 15, 1998.<sup>21</sup> May stated that on the morning of June 8, election day, he called Maziarz to his office.<sup>22</sup> May stated that at this meeting, he presented Maziarz with the chart and accused him of making a false statement because the chart indicated Maziarz had received raises over the years. According to May, Maziarz appeared embarrassed and replied that he was speaking of merit increases as opposed to general increases.

According to May, Maziarz then asked him about merit increases and May said he was not prepared to talk about this—that Maziarz should speak to his supervisor who evaluates him and determines what he needed to do to get a merit raise.

May also stated that Maziarz told him that he was contemplating leaving the Respondent to work for other employers as had about 20–25 of the Respondent's employees. According to May, Maziarz asked him his opinion of such a move. May stated that he told Maziarz that these companies hire lots of people and, within 89 days, lay them off. He stated that he told Maziarz the grass is always greener (in another's pasture) and that Maziarz always had a stable job at the Respondent and the Company planned on keeping it that way. The meeting, which lasted about 15–20 minutes according to May, ended on that note.

May emphatically denied interrogating or surveilling employees to determine whether they supported the Union, that day or any other days prior to the election. In fact, according to May, he was very careful about his behavior, having been coached on what he could and could not say. May stated that he was wary because he did not know whether Maziarz was

trying to entrap him. May also denied that he tried to persuade Maziarz to vote against the Union, or telling him to tell the other employees to vote against the Union. May acknowledged at the hearing that he did not want his employees to vote for the Union.

The General Counsel submits that May went far beyond his stated purpose of simply correcting the record regarding Maziarz' opinions about raises. He submits May's strident statements suggesting that employees start their own "damn" company if they wanted a union, coupled with his request that Maziarz, a long-term employee with possible influence with the workers, tell the employees to vote against the Union that was "bad" for the Company, were coercive and constitute an unlawful interference under the Act.

The Respondent essentially argues that May did not ask Maziarz to vote or solicit him to tell the other workers to vote against the Union. The Respondent argues that, *arguendo*, even if Maziarz' testimony were credited, May, at most, only offered a prediction on the vote and, in fact, agreeing with Maziarz' concerns, May actually instructed him not to tell the other employees to vote against the Union.

The resolution of this charge, like most of the charges in this litigation, redounds to credibility determinations. Here, the question is, did May solicit Maziarz' assistance in persuading the other employees to vote against the Union; and, if so, did this solicitation, under the circumstances, reasonably tend to interfere with the free exercise of the employee's Section 7 rights?

I note that Maziarz is a current employee and has been employed with the Respondent for a fairly long time; he also seemed to be regarded as a good employee by the Company. As I observed him, Maziarz seemed to be forthright and straightforward in his testimony when examined by either party; he did not embellish and seemed to have no axe to grind with the Respondent although he was an admitted supporter of the Union. I believe he testified truthfully regarding what happened at the meeting, and I credit his testimony. This is not to say that I viewed May's testimony to be wholly untruthful. For instance, May, I believe, acting in good faith, wanted to correct what he believed was Maziarz' mistaken idea of the raises he claimed not to have received, and, perhaps, he wanted Maziarz to correct this with the other employees before the election.<sup>23</sup> However, as will be evident in another section of this decision, May was truly and adamantly antiunion, and I believe he took the opportunity with Maziarz to get his point across. Clearly, May could have, consistent with his purpose, given Maziarz the chart with his raises, disabused him of his mistaken notions about his raises, and have been done with the matter. This would have taken at most a few minutes—not the 15–20 minutes May said the meeting lasted.

Again, Maziarz seemed genuine in his relating of the meeting's conversation, even to the point of telling May he did not think it advisable to try to change the workers' minds—in effect refusing his boss' solicitation. However, under the circum-

<sup>21</sup> See R. Exh. 24.

<sup>22</sup> May stated that he was aware of the prohibition against electioneering within the 24-hour period before an election and was unsure of how to handle Maziarz' concerns. According to May, he asked his consultants whether it was permissible to speak to May. May said the consultants advised that it was permissible to speak to Maziarz about the issue. However, be that as it may, the Respondent is not charged with any violation of the 24-hour rule nor did the General Counsel address this aspect of the Respondent's conduct with regard to this violation involving Maziarz. Accordingly, I make no finding on this point.

<sup>23</sup> May testified that Maziarz did not offer at the meeting to tell the other workers that he and May were talking about different types of wages—a communication problem.

stances, I would conclude May's solicitation was unlawfully coercive. I note that the meeting was a one-on-one meeting in the office of the highest ranking official at the Company; that May's tone and language was strident and somewhat threatening; and that May coupled his solicitation for Maziarz' assistance with his fellow workers with a reminder of his never having been laid off and an implied promise that he would not be in the future. In my view, these circumstances, coupled with the offending solicitation, reasonably tended to interfere with Maziarz' and his fellow employees' rights under the Act. *Salvation Army Residence*, 293 NLRB 944 (1989), enf. granted 923 F.2d 846 (2d Cir. 1990).

## 2. The postelection 8(a)(1) allegations

### *a. Romanelli's June 2000 imposition of a nonunion discussion rule (subparagraph 8(c))*

The complaint alleges that the Respondent violated Section 8(a)(1) by and through supervisor/agent, Romanelli's telling employees they could not discuss the Union during work hours.

The General Counsel called a former employee, Steven Coughran, a welder, to establish this charge.

Coughran testified that his welding department supervisor, Romanelli, held a meeting with the employees a couple of days after the election.<sup>24</sup>

After convening the group, Coughran stated that Romanelli began the meeting with a statement that things have changed a little as we all know the Union was voted in. Romanelli then proceeded to say that the Company did not want the Union and that it was going to be tough, and like a double-edged sword and both sides could be jabbed. According to Coughran, Romanelli was very blunt and said that the Company was going to do everything it could to get the Union out or would fight it. Also, according to Coughran, Romanelli then stated that he wanted to show the employees what having a union was going to do, that if the employees wanted to be treated like a union, he would treat them like a union. Romanelli then announced that, henceforth, the welders were to stay at their benches and needed parts would be retrieved for them by the coordinators or floor truckdrivers. Coughran also said that Romanelli also told the workers that he did not want any talk between us, to keep that union stuff out of the shop; it was not wanted. Romanelli, according to Coughran, said no talk at all.

Coughran stated that prior to this meeting, shop practice allowed employees to leave their benches at their discretion to get parts as long as they were working. Also, prior to Romanelli's announcement, the employees were allowed to talk among themselves while performing their jobs.<sup>25</sup> In the after-

math of the meeting, Coughran said that all the welders remained at their benches, and only when the coordinator or the floor truckdriver were not available would they get parts for themselves.<sup>26</sup> Also, according to Coughran, any workers caught talking at their benches while waiting for parts were written up.

Romanelli admitted that he held a meeting of his welding department crews after the Union was voted in because there was so much "distraction"<sup>27</sup> prior to the election, and he wanted to let the employees know that he was going to do everything he could to eliminate distractions occurring before the vote, including the bickering between those on opposite sides of the union issue and to encourage a focus on work. Romanelli acknowledged that Coughran was among those in the meeting.

Romanelli stated he told the workers to restrict the nonwork-related talk to their breaks and lunches. Romanelli said that he told his workers that on his time, they were to make sure that they only conducted business and talked only about business. Romanelli stated that he specifically told the workers not to talk about the Union except during breaks and lunches. (Tr. 927.) However, Romanelli denied forbidding the employees from talking at all while they were working,<sup>28</sup> but still he wanted to eliminate distracting conversations. He felt that forbidding employees from going to each other's benches helped eliminate, in his view, opportunities for distracting conversations. Thus, for this reason, according to Romanelli, he instituted the practice of having parts delivered to the benches.

The General Counsel essentially contends that the new no-talk rule promulgated and enforced within days of the Union's election by Romanelli, along with his contemporaneously announced new rule requiring welders in his department to stay at their benches, was nothing more than the first attack by the Respondent on the Union and the employees' rights guaranteed by the Act. The General Counsel asserts that the focus of these rules were clearly on the Union or the recently concluded union organizing campaign since Romanelli pointedly told the welders he wanted to keep the "union stuff" out of his department, and all complained of "distractions" were related to the union campaign.

The Respondent counters and contends that Romanelli simply reemphasized an already existing shop rule against nonwork-related talking during worktimes. It asserts that the rule was predicated on halting discussions and eliminating bickering

<sup>24</sup> Coughran stated that he is not currently employed by the Respondent, having been called to active duty with the Michigan National Guard because of the September 11, 2001 attack on the United States. Coughran could not recall the precise date of the election or the meeting in question, which was one of the two postelection meetings he could recall that Romanelli convened. Coughran acknowledged that he was and still is a member of the Union.

<sup>25</sup> Notably, another employee, Ed Jarvella, an assembly department employee, testified that he has had nonwork-related conversations even with supervisors such as Jack Binder and Mike Pagano, as well as other coworkers. He had never been disciplined for this behavior.

<sup>26</sup> Coughran stated that he had been employed with the Respondent for the last 3 years and had gotten his own parts, which were kept in a different part of the plant. After Romanelli's meeting, workers were required to stay at their benches and contact a coordinator who would direct the floor truckdrivers to return the needed parts. According to Coughran, under this system, often welders were standing idle at their benches awaiting the delivery of parts.

<sup>27</sup> On cross-examination by the General Counsel, Romanelli described "distraction" as people preoccupied with what was or was perceived as going on at the plant; he claimed that talk around the plant had gotten to a distracting level and talking was interrupting the flow of work in his view.

<sup>28</sup> In answer to the following question posed by the Respondent's attorney, "Did you forbid them from talking at all while they were working," Romanelli answered, "no sir." (Tr. 896.) He did not elaborate.

during worktimes; that Romanelli was equally clear in informing the workers that, as before, they could talk about nonwork-related topics during breaks and lunch.

First, there seems to be little reason to doubt Coughran's version of what happened at the meeting in question. In my view, he testified honestly and sincerely, and without acrimony or embellishment. He even insisted on his recalled version in the face of an artful cross-examination. Moreover, he also expects to return to the Respondent after service to his country and, of course, by testifying, put himself at possible economic risk. I would credit his version of the Romanelli meeting. *Flexsteel Industries*, 316 NLRB 745 (1995).

Turning to the Respondent's defense, I note that the Respondent's handbook, which sets forth rather comprehensively a long list of work rules, among other things, prohibits employees from interfering with any employee's performance of duties by talking or other distractions.<sup>29</sup> However, the handbook does not list a rule prohibiting talking—about the Union or any nonwork-related topic—except during lunch and breaktimes. Thus, the proof of this preexisting rule, as asserted by the Respondent, comes mainly from Romanelli who, I have previously found preelection, threatened union supporters.<sup>30</sup> Notably, the working rule in the handbook does not specifically or literally inform employees that they may talk about nonwork-related topics during lunch and break. I recognize that the Respondent has a legitimate business concern about disruptive arguing and bickering among employees. However, I agree with the General Counsel that Romanelli's announcement of the no-talk rule under the circumstances, especially the recent successful conclusion of the election, unreasonably interfered with the employees' Section 7 rights. In fact, specifically, I conclude that Romanelli's announcement was directed at clamping down on the Union and possibly getting rid of it. Prohibiting the employees from discussing the Union among themselves was simply one of the first steps toward that end. I would find a violation of the Act. *Opryland Hotel*, 323 NLRB 723, 731 (1997).

*b. Romanelli's July 13, 2000 interrogation and creation of surveillance of employees (subparagraph 8(e))*

The General Counsel called current employee<sup>31</sup> Ronald James Martin as a witness for this charge.

Martin testified that Romanelli supervised him and gave him his job performance evaluation on two occasions—July 13, 2000, and January 11, 2001.<sup>32</sup> Martin stated that on July 13, 2000, Romanelli and he met at the loading dock to discuss his evaluation. However, according to Martin, Romanelli initiated the discussion by stating that he knew that the guys he (Martin)

hung around with were all “union pushers,”<sup>33</sup> that Romanelli did not know where Martin stood at the time, that is whether he was hanging around them to find out information. Martin stated that he told Romanelli that he associated with those workers because he, too, was for the Union. Martin stated that he wore union buttons on his hat every day after the election. According to Martin, Romanelli also said in this conversation that he had seen him hanging around those guys on your break-time. Martin said he felt that Romanelli's questions and claimed observations were designed to determine whether he was simply hanging around the workers to get more information about the Union or to find out if he himself supported the Union. Martin stated that he was puzzled by Romanelli's question. Since he wore union buttons daily, it was clear he was a union supporter.

Romanelli, called on to meet this charge, stated that he met with Martin at his workbench to discuss his July 2000 evaluation and went over Martin's performance elements point-by-point. According to Romanelli, the Union and its members were not mentioned, although he acknowledged that he and Martin did discuss people with whom Martin was associating. Romanelli not only denied using the term “union pusher,” but also stating to Martin that he knew Martin was hanging around union supporters. Romanelli stated that in the context of the evaluation, he was merely being “creative” and suggested that Martin make positive changes in his work routine and his choice of associates.

There is no dispute that on July 13, 2000, Martin received his semiannual performance evaluation, the results of which would undoubtedly determine whether he received in the short term a raise but, in the long term, could affect possibly affect his future raises as well as his continued successful employment with the Respondent. Also, one cannot overlook the Union's having only recently won a tough election. Then, there is management's antipathy toward the Union, and Romanelli's previous unlawful conduct (as previously found by me) before and immediately after the election.

The Respondent contends that Romanelli's version of this July 13, 2000 meeting is the more credible and asserts his version is corroborated by Romanelli's comments about Martin on his performance evaluation.<sup>34</sup> By contrast, the Respondent asserts that Martin's testimony is uncorroborated.

I note that in point of fact, Romanelli, on July 13, 2000, did not make any written comments on Martin's performance evaluation; his written comments about Martin were made on January 12 and July 26, 2001. So, in terms of what was said at the July 13 meeting, each witness must be evaluated on his word at the trial.

<sup>29</sup> See GC Exh. 34, the SCE employee's handbook, at p. 26.

<sup>30</sup> Another employee, James Martin, testified that he knew that employees were allowed to talk about work-related matters during work-time, but not nonwork-related topics. Martin claimed he was written up for talking 2 months before the hearing.

<sup>31</sup> Martin has been employed by the Respondent for 6-1/2 years as a welder on the first shift.

<sup>32</sup> These performance evaluations also are the subject of alleged violations of Sec. 8(a)(3) and will be discussed later in a separate section.

<sup>33</sup> According to Martin, Romanelli mentioned the names of employees Mike Doyle, Scott Cronkright, and Mike Leach. Martin stated that Leach was elected as a bargaining unit representative after the election; Cronkright was one of his best friends and a known union supporter who wore union shirts and buttons on the job; Doyle was also a friend, who supported the Union but was low key in his support and did not wear buttons and other union gear.

<sup>34</sup> Martin's performance evaluations covering the period of his employment—December 19, 1995, through July 26, 2000—are contained in GC Exh. 43.

I have decided to credit Martin's testimony over Romanelli's. First, Martin, a current employee, testified in a straightforward, clear fashion without acrimony or embellishment. Second, he freely admitted he was a union supporter and agreed that in terms of his July 13 evaluation, Romanelli approved the wage increase to which he was entitled. He bore no grudge against Romanelli. He also insisted that Romanelli made the statements to him, which he concluded did not make sense to him. Romanelli, on the other hand, while denying the offending statements, claimed he was in effect trying to encourage Martin merely to make changes in his choice of associates. He provided little or no explication of what he meant by this. In my view, this version did not ring true, especially in view of Martin's claim that Romanelli's comments focused on three known union supporters. Martin reasonably could interpret Romanelli's comments to mean that he should avoid those union supporters if he expected favorable performance evaluations in the future or valued his job with the Company.

In my view, Romanelli clearly coercively interrogated Martin on July 13, 2000, during his performance evaluation and also created an impression that he had been surveilling Martin about and because of his involvement with the Union, as well as his association with other suspected union adherents, all in violation of Section 8(a)(1) of the Act.

*c. The July 28, 2000 Binder statements  
(subparagraph 8(f)(1-5))*

The complaint alleges that the Respondent, through one of its supervisors, Jack Binder, violated the Act essentially by surveilling, interrogating, and making coercive statements to, as it turns out, one employee at a meeting on July 28, 2000. The employee, Robert Stack, was called by the General Counsel to testify about his encounter with Binder.<sup>35</sup>

Stack stated that he became aware of the Union's organizing campaign in early April 2000. Stack said that Binder asked to speak with him privately in the conference room early (around 6:15 a.m.) on the morning of July 28, 2000. According to Stack, Binder appeared very upset and began the conversation by throwing his safety glasses across the table, and then stated that he was upset and pissed off seeing Stack and a group of employees standing around bullsh—g before the bell and prior to the end of the day. Binder also said he was sick and tired of seeing him standing around wasting time and did not want to see him talking to Greg Kennedy,<sup>36</sup> or any other employee at any time in a group or during company time. According to Stack, Binder said that since the election, Stack had been talking to Kennedy about what Binder assumed was union business on company time.

Binder said if he caught Stack talking with Kennedy or any other employee in a group or at any time, that this meant Stack obviously had too much time on his hands. Binder said he

would cut Stack's hours from 10 to 8 hours per day or transfer him to another department.<sup>37</sup> According to Stack, Binder said that he knew where Stack stood regarding the Union, that he was prounion, and that the Company recognized this fact; and that the Company also knew Kennedy was for the Union. Stack said he tried to explain that he was not talking about the Union but Binder said the Company knew where he stood nevertheless. Stack also stated that Binder told him that his (Stack's) work performance had gone down; that he had become a bad employee.

According to Stack, Binder also said that he was going to try to protect Stack but that Stack had better just stay busy; he had better look busy. Stack said he asked Binder what he needed protection from; Binder gave no response but merely ended the meeting by saying that he had gotten everything off his chest, shook Stack's hand, and left.<sup>38</sup>

The Respondent called Binder<sup>39</sup> to refute these charges.

Binder acknowledged that he once met Stack in the conference room to discuss Stack's performance evaluation and, because he needs his glasses to read, denied throwing his glasses in the meeting.<sup>40</sup> According to Binder, he only discussed Stack's performance evaluation but he could not with confidence recall whether the Union came up in the discussion. According to Binder, if the Union as a topic was raised in the meeting, it was initiated by Stack's asking him if his evaluation would be affected by his (Stack's) union activity. Binder stated that he told Stack that the evaluation would not be affected by union activities. Binder acknowledged that he knew that Stack, Kennedy, and several other workers were union activists either before or after the election.<sup>41</sup>

According to Binder, during Stack's performance evaluation, Kennedy's name did not come up and he specifically denied saying anything about those with whom Stack associated, or surveilling Stack or other employees. Binder also denied making any inquiries of Stack as to who was or was not in the Union; and he denied advising Stack to refrain from associating with union activists.

Binder also denied telling Stack (or any other employee) of the Company's negative reaction to the filing of the unfair labor practice charge with the Board. Binder stated that he never interrogated any employees regarding their reasons for supporting the Union. Binder could not recall in any meeting with employees, including Stack, telling them they were disloyal or poor workers; and he said he never threatened Stack or anyone else with written discipline or reduction of overtime hours because of their support of the Union.

<sup>37</sup> Stack stated that Binder told him that he knew Stack was the sole support of his family. Binder said he would have no problem cutting Stack's hours to 8 hours per day or transferring him if things kept up the way they were.

<sup>38</sup> According to Stack, this meeting lasted about 1-1/2 hours.

<sup>39</sup> Binder testified that he has been employed by the Respondent for about 32 years; his current duties include supervising the packaging and shipping department which he has done for 15 years.

<sup>40</sup> Binder did not provide a date or other timeframe for this meeting.

<sup>41</sup> Binder also mentioned Wayne Tornberg, Mike Leach, and a Mr. French as employees known to him as union activists.

<sup>35</sup> Stack stated he has been employed by the Respondent for around 7 years in its packaging and shipping department. He works on the first shift (6 a.m.-4:30 p.m.) and has been supervised by Binder the entire time.

<sup>36</sup> Stack testified that during the organizing campaign he became aware of Kennedy's central role with the Union; Kennedy was regarded as the one to see about the Union.

Binder noted that the Respondent had hired consultants to advise management about the rights of the employees and employer during the organizing campaign. He felt that he was well versed in the dos and don'ts of this process, and had also experienced an earlier organization drive by the Teamsters at the Respondent's facilities. Accordingly, Binder said he never spoke to employees in a group or individually with regard to the Union or to find out information about the Union.

The General Counsel contends that Stack's version of the Binder meeting offers clear evidence of the Respondent's violation of the Act. He suggests that Binder's version consisted of general denials made in response to leading questions of the Respondent's counsel and, therefore, should not be credited over the specific and direct testimony of Stack.

The Respondent argues that Stack exhibited such poor recall and confusion in his testimony that he should not be believed. On the other hand, the Respondent contends that Binder was a longtime supervisor with the Company who had prior experience with a prior union organizing campaign and had received training for the latest union campaign—he was well aware of the rules pertaining to employee rights. Accordingly, his denials, the Respondent submits, should be credited, especially since the General Counsel offered no corroboration to what amounts to a one-man's word against another situation.

While Stack did exhibit some confusion about the hours he worked, it seemed to me his confusion was based on the shifting number of hours called for by his schedule over the past years. I have also taken notice that Stack also made statements about the July 28, 2000 meeting in a handwritten memorandum<sup>42</sup> and in an affidavit<sup>43</sup> he provided to the Board agent, both of which contained information somewhat inconsistent with his trial testimony. These documents were offered by the Respondent and admitted by me for impeachment only. However, in spite of some minor inconsistencies, I do not believe that Stack's testimony was unreliable. Rather, in the main, these documents offer substantial corroboration of his testimony at the hearing. It should be noted that, according to Stack, he was basically subjected to a tirade by Binder, a veritable fusillade of invective and threats. Perhaps, it was simply beyond Stack to capture with pinpoint accuracy Binder's comments delivered over the course of an hour and a half. On the witness stand, Stack, however, was steadfast, sincere, and confident in relating the incident. I would credit his version of the encounter.

By the same token, Binder's version of the meeting seems lacking. First, he provided no timeframe for a purported performance evaluation meeting with Stack—an important event. Also, Binder did not elaborate on this performance evaluation. According to Binder, the performance evaluation simply took place and he denied that he made the offending statements attributed to him. As will be discussed later in this decision, the

<sup>42</sup> See R. Exh. 17. Stack said that after the meeting with Binder, he jotted down some notes about the meeting. These were not produced at the hearing. Stack said that because of his visual impairment and migraine problems, which prohibit writing at length, his wife helped him prepare the memorandum and he signed it.

<sup>43</sup> See R. Exh. 18. It would appear that the complaint allegations are derived from this affidavit.

Respondent's managers follow a fairly set procedure for employee performance evaluations, including an interview and a performance evaluation document that is signed by the supervisor and the employee. There was no documentation adduced by the Respondent to corroborate this purported evaluation of Stack. I believe that Binder simply was not telling the truth about the purpose of the meeting on July 28, 2000, as well as what transpired there.

Therefore, I would find and conclude that Binder, on July 21, engaged in unlawfully coercive and interfering conduct in the following particulars: by stating to Stack that he was a poor or bad employee and threatening to reduce his overtime because of his support for and involvement with the Union or its supporters; by surveilling Stack and telling him that he and the Company knew he was a union supporter and that he was seen talking to other union supporters; by advising Stack to refrain from associating with union activists; and by threatening to transfer him to another department, all in violation of Section 8(a)(1) of the Act.<sup>44</sup>

*d. The August 16, 2000 disparate enforcement of a no-trespassing rule by the Respondent's agents (subparagraph 8(g))*

The complaint alleges essentially that on August 16, 2000, the Respondent, through Romanelli, accompanied by fellow admitted supervisors, Troy Henk and Todd Hall, told union supporters distributing union meeting notices after work hours in the company parking lot that they were trespassing and ordered them off the premises; that this overly broad no-trespassing rule was not similarly enforced against employees who opposed unionization at the Respondent's facilities.

The General Counsel called Greg Kennedy, Wayne Tornberg, and Michael Leach as witnesses regarding the August 16 incident.<sup>45</sup>

Kennedy testified that on August 16, 2000, at about 4:30 to 5 p.m. after completing their shifts, he, Mike Leach, and Wayne Tornberg were distributing fliers reminding workers of an upcoming union meeting<sup>46</sup> outside the facilities in the back parking lot near the main door to all employees as they were leaving work or coming to work for the next shift. According to Kennedy, he noticed Assembly Supervisor Todd Hall nearby observing them and using a hand-held radio. A few minutes later, Romanelli and Paint Department Supervisor Troy Henk<sup>47</sup> ap-

<sup>44</sup> Contrary to the General Counsel and the complaint, I do not find that Binder either impliedly or expressly told Stack he was a disloyal worker or that he would be given a written discipline because of his union involvement. I do not believe the record supports a finding of a violation on these points. I would dismiss these aspects of the complaint. Likewise, I would dismiss the allegations charging the Respondent with Binder's coercively telling Stack of the Company's negative reaction to a filing of a charge with Board or coercively interrogating Stack about his reasons for his support of the Union. The record does not support these charges.

<sup>45</sup> On about July 8, 2000, Kennedy was elected chairman and Tornberg and Leach were elected to the employee bargaining committee.

<sup>46</sup> See GC Exh. 15, a copy of the reminder notice for a meeting scheduled for August 20, 2000, at the union hall, that Kennedy and the others were distributing.

<sup>47</sup> Henk's name is misspelled in the complaint as Hank.

peared on the scene. According to Kennedy, Romanelli approached them and said they had to leave the premises as they were trespassing. Tornberg, according to Kennedy, protested, saying that the three worked at the plant and questioned the trespassing charge.

Kennedy said that Romanelli said that the three were indeed trespassing, that he did not want any trouble, and again asked them to leave, and they did.

Tornberg and Leach both testified about the August 16 encounter and essentially corroborated Kennedy's account.<sup>48</sup>

Tornberg also testified that on other occasions he had returned to the plant after punching out and had never been confronted with a trespassing charge or otherwise told that he could not return to come inside the premises. Tornberg also related a time when he met coworkers on plant property after his shift as they were also gathering for the day to participate in a gambling outing and, in fact, went inside the building and spoke to two supervisors on this occasion. Tornberg related other occasions when he had forgotten personal items and returned to the plant after his shift to retrieve them without incident.<sup>49</sup> He also recalled seeing Romanelli and an antiunion employee, named Scott Keyser, dressed in short pants, obviously off work, conversing while sitting on a guardrail outside the plant. Tornberg stated that he had seen Plant Manager Jerry Simms' and Romanelli's wives visiting the plant at lunchtime, as well as wives and girlfriends of various employees on various occasions.

Leach testified that prior to August 16, and even afterwards, he quite often—about 25 or 30 times—left the plant and then returned to retrieve personal items. According to Leach, the August 16, 2000 incident was the only time management had said anything to him about being on company property after punching out, and ordering him off the property. Nothing of this sort has been said since that time.

The General Counsel called witnesses Charles Jarvela, Derek Dukarski, and Stack regarding the Respondent's discriminatory enforcement of the no-trespassing rule.

Jarvela<sup>50</sup> testified that around mid-June 2001, at around 5:50 a.m. at the beginning of his first shift assignment, he observed three employees, Mike Sopcak, Jerry Childs, and another man,<sup>51</sup> standing outside of the plant's main employee entrance approaching other employees as they were entering the building. According to Jarvela, the three men appeared to be handing manilla folders to employees who appeared to be signing the folders. Later that same morning (around 9:50 a.m.), while on break, Jarvela stated that he saw the same three employees at the front employee entrance with the folders and again approaching and obtaining signatures from employees leaving for

and coming back from their breaks.<sup>52</sup> On both occasions, according to Jarvela, Paint Department Supervisor Henk was standing with the three, perhaps about 5 feet away<sup>53</sup> from them, just outside the main door of employee entrance near Henk's parked motorcycle. Jarvela stated that he could not say for sure that Henk was talking with the three employees, but Henk did not appear to be soliciting signatures.

Derek Dukarski, employed by the Respondent for about 2-1/2 years as a packing clerk, testified that some time in mid-June 2001 at around 5:45–5:55 a.m., as he was reporting for work, he observed Sopcak and another employee, whose name he did not know, standing on the sidewalk within 5 to 10 feet of the employee entrance door near the parking lot, with clipboards in hand. According to Dukarski, he saw the two men approaching the arriving employees and was told by the unidentified man that he and Sopcak were asking employees to sign a petition to oust the Union. Dukarski later heard the solicitations being made, although he himself was not asked to sign the petition. Dukarski also stated that he observed Troy Henk, the second-shift supervisor, standing on the sidewalk at the entrance within 5 to 10 feet of Sopcak and the other men. According to Dukarski, Henk appeared to be watching the workers to see if they would sign; he appeared to be glaring at them. During the 10 minutes he observed those activities, Dukarski stated that Sopcak and the other men approached around 20 people and that about 10 signed.<sup>54</sup>

Stack testified that he knew Sopcak as a nonsupervisory worker in the Respondent's programming department. At about 5:50 a.m. around mid-June 2001, he too, saw Sopcak and another man (and perhaps a third man) with clipboards, standing at the employee's entrance. According to Stack, Sopcak approached him and asked if he would sign a petition to get the Union out of the shop. Stack said he told him no but decided to observe the activities. According to Stack, at around this time—5:40 to 5:45 a.m., Henk pulled up on his motorcycle and parked at the front entrance. According to Stack, Henk stood behind and between Sopcak and the other man, about a foot away from them, and appeared to be watching them but did nothing more. Stack said he observed the two men approaching and speaking to the employees;<sup>55</sup> and some employees stopped to sign the petition. Stack stated that when he punched in at around 6 a.m., Sopcak and the other men were still at the entrance.

The Respondent submits (as it has argued previously) that while any distribution of written or printed matter on the company premises may not be done without first obtaining management's written permission (p. 25 of the handbook), that solicitation is permitted on nonworking time (as stated on p. 18 of the handbook). Accordingly, the Respondent contends its no-trespassing rule is not overly broad. The Respondent argues

<sup>48</sup> Leach also said that he told Romanelli that he had just punched out a few minutes before.

<sup>49</sup> Tornberg said one such occasion took place on September 18, 2000. Tornberg also said that employees are allowed to eat lunch in their cars on premises when they are "off the clock."

<sup>50</sup> Jarvela had been employed with the Respondent since April 1995 but was laid off around the first week of January 2002. His last job with the Respondent was an assembly department crib attendant.

<sup>51</sup> Jarvela did not know the third person.

<sup>52</sup> Jarvela says he was not approached by the three.

<sup>53</sup> I note that this witness had some difficulty in judging distances.

<sup>54</sup> Dukarski identified himself as a union supporter who showed his support for the Union by wearing union T-shirts with the union logo at least as early as August 2000. He also admitted that he was asked by fellow employee Robert Stack to observe Sopcak's activities.

<sup>55</sup> Stack stated that Jarvela and Dukarski were among the employees coming to work at this time.

that it did not treat the union supporters disparately on August 16 because, in June 2001, none of its managers knew that employees opposed to the Union were circulating a decertification petition.

Inasmuch as the Respondent does not contest the fact that even under its own interpretation, it misapplied the no-solicitation rule as to Kennedy, Leach, and Tornberg, and I have previously found for the reasons stated herein that the no-solicitation rule in question is overbroad, the only question is whether there was disparate treatment of the prounion employees.<sup>56</sup>

The Respondent called Henk who admitted that on the day in question, he arrived for work<sup>57</sup> on his motorcycle and saw a group of employees at the main entrance of the plant engaging in some activity. According to Henk, he saw three employees<sup>58</sup> with clipboards but he had no idea what they were doing, and he did not hear them speaking although he was about 8 feet away. Henk stated that he was smoking a cigarette for about a minute next to his motorcycle and then proceeded to the building and punched in for work. Henk stated that he never approached or said anything to the employees with the clipboards for the short period he was in the parking area and that he did not see them approach other employees. Henk initially stated that he customarily takes his break at 1:50 p.m., and not before; however, on the morning in question, he did take a morning break at which time he saw no employees with clipboards, only employees mulling about and talking.

Henk stated that the next day, he came to work and saw the same people with clipboards standing out in front of the main entrance. However, once more Henk stated he said nothing to them, nor did he stand by them. Henk claimed that he was not really watching these activities but was unconformable with what was going on, and so did not want any involvement. He did not know that the clipboard held petitions.

Contrary to the assertion of the Respondent, I conclude that based on the clear and obvious circumstances as related by the General Counsel's witnesses, it did, in all likelihood, know that the other employees were, at the least, soliciting their fellow employees on company property. I further would find and conclude that the Respondent, in all likelihood, knew that the employees were soliciting signatures to decertify the Union in mid-June 2001<sup>59</sup> and, with this knowledge, purposely did not enforce its no-trespassing/no-solicitation rule against these employees.<sup>60</sup> I note that Henk was one of the three supervisors

who confronted unionists Kennedy, Tornberg, and Stack in August and was present when Romanelli ordered them off of the premises for soliciting. Here, Henk, by his own admission, saw employees with clipboards approaching the employees and, while somewhat uncomfortable, said nothing and did nothing over a 2-day period in the matter; he did not want to be involved. I find this incredible considering how quickly the Respondent's agents acted on August 16, 2000, when the three union supporters, for a short period, were distributing fliers about the union meeting. It seems clear to me, based on the credible testimony of Jarvela, Dukarski, and Stack which is frankly un rebutted, and the extant circumstances the Respondent's management, including Henk, were fully aware of what was going on with Sopcak and his colleagues in the parking area.<sup>61</sup> Henk's claim that he turned a blind eye and deaf ear to the goings-on is simply not believable. It seems implausible that he would be uncomfortable about something about which he knew nothing. Accordingly, I conclude that the Respondent's no-solicitation/no-distribution rule is overly broad and was disparately and discriminatorily enforced on August 16, 2001, against the union supporters in violation of the Act.

*e. The September 2000 interrogation of James Sperry (subparagraph 8(h))*

The complaint alleges that two of the Respondent's agents, its personnel director and a supervisor in its fabrication department, some time in September 2000 in preemployment interviews, coercively interrogated a prospective employee about his union sympathies and support, informed him that the Union would no longer represent its employees in the near future, and subsequently instructed him not to converse with union supporters.

The General Counsel called James Sperry<sup>62</sup> to establish the charge. Sperry testified that he responded to an ad for a job at the Respondent and was interviewed by Doug Sandula, whom he thought was the personnel director.<sup>63</sup> around the first week of September 2000. According to Sperry, Sandula, while reviewing Sperry's application, asked him if his former employer was a Teamsters (union) shop. Sperry said he said no, but that the employer was a UAW (shop). Sandula then explained, saying that he was asking because there was a union trying to get in at the Respondent, and how would Sperry feel about working at the Company if there was a union. Sperry said that he told Sandula he was neutral; he could take it or leave it. According to Sperry, Sandula then said it probably did not mat-

<sup>56</sup> The Respondent, on p. 16 of its posthearing brief, stated that the appropriate remedy for the misapplication of its no-solicitation rules is an order to stop enforcing the p. 25 rule without reference to the p. 18 rule.

<sup>57</sup> Henk acknowledged that, as a first-shift supervisor, his day starts at around 5 a.m.; that, often, he arrives earlier than his employees.

<sup>58</sup> Henk recognized Mike Sopcak and Jerry Childs as two of the three employees he observed; he did not know the third man.

<sup>59</sup> There seems little doubt on this record that the dates of the solicitation efforts took place on June 13 and 14, 2001. I would so find.

<sup>60</sup> While the complaint characterizes the rule as a no-trespassing rule, basically the rule in question to me is the same no-solicitation/no-distribution rule previously discussed. The Respondent's handbook makes no reference to trespassing, and it seems to me that trespassing

was the term used by Romanelli to intimidate or coerce the union supporters to leave the property with an implied threat of police involvement or other serious consequences.

<sup>61</sup> The Respondent merely attacks the credibility of those witnesses based on what I consider insignificant discrepancies in their testimony and/or, as in the case of Jarvela, his being Kennedy's roommate.

I also conclude that, based on this record, the Respondent knew that Sopcak was known by it to be antiunion.

<sup>62</sup> Sperry worked for the Respondent from September through November 9, 2000; he said that he left because of dissatisfaction with his rate of pay and long hours at the Respondent.

<sup>63</sup> The Respondent admits that Sandula is and was employed as its personnel director and that he is one of its agents/supervisors. Sandula did not testify at the hearing.

ter because (essentially) so many union supporters had left the Respondent for other jobs that he was quite sure the Union would be ousted.

According to Sperry, Sandula called him sometime after this interview concluded and set up a second interview. Sperry was interviewed a second time, later that same day, this time by Len Harrington<sup>64</sup> who, according to Sperry, identified himself to Sperry as a supervisor in the Respondent's fabrication department.

Sperry said that he met with Harrington who explained the fabrication department's operations and what his duties would be if he were hired. According to Sperry, Harrington also asked him what he felt about unions and advised that specifically a union was trying to get in at the time. Sperry said he told Harrington that he was neutral, and again, he could take a union or leave it. Sperry said that Harrington said that he thought the Union would probably be ousted because most of the union supporters, whom Harrington described as troublemakers, had left for other employment.

Sperry was hired around September 18 and received an orientation by Sandula who, among other things, went over company benefits. According to Sperry, Sandula warned him that when he got on the work floor, there were going to be some workers for and some against the Union. He advised Sperry not to talk to either side, just walk away from them; that he did not have to talk to anyone.<sup>65</sup> Sperry stated that Sandula did not threaten him with discipline if he talked about the Union with another worker.

Because neither Sandula nor Harrington testified at the hearing, Sperry's testimony is for all practical purposes un rebutted. While the Respondent at the hearing attempted to impeach Sperry, I believe it was not successful. In my view, Sperry testified consistently and without exaggeration; he insisted that his version of the contacts with the Respondent's agents and supervisors happened as he testified. On bottom, he was a highly credible witness in my view. I would credit his testimony.

The issue then becomes whether, under the circumstances, the statements by the Respondent's agent and supervisor to Sperry reasonably tended to coerce or interfere with the free exercise of his rights as an employee under the Act. *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The General Counsel argues that Sandula's and Harrington's interrogations about Sperry's feelings about the Union constitute illegal interrogation under the Act, and Sandula's advice not to associate with either union or nonunion supporters was unreasonably coercive, as was his statement that the Union would soon be ousted.

The Respondent submits that Sandula, in the first interview, was merely inquiring whether Sperry could handle working in a union environment after having been laid off by a union employer. Since Sperry indicated he could, the Respondent submits that Sandula simply made a prediction that the Union would be ousted and hired Sperry in spite of his saying he could (indeed) "take the union." The Respondent further submits that the comments<sup>66</sup> made to Sperry in the orientation session were in the nature of a reminder of the workplace rules prohibiting nonwork-related conversation on the shop floor during worktime; that Sandula's reminder of the rule was appropriate in context, given the ongoing controversy among the workers about the Union on the shop floor and the potential for nonwork-related conversation taking place.

I note first that since neither Sandula nor Harrington testified, the Respondent's argument is just that, an argument constructed in its brief, and, as such, is not persuasive given the legal standards applicable to an 8(a)(1) violation.

Second, the circumstances or context of the offending conduct and/or statements are controlling, not the motives or rationale of the Respondent. Here, Sperry, a prospective employee was interrogated on two occasions by management about his feelings about the Union. On each occasion, he professed neutrality. However, under Section 7 of the Act, an employee is, broadly, free to support or not support a union; he does not have to be neutral. When asked about his feelings about the Union at his first interview, Sperry could reasonably have felt that he had to be careful about his answer. At the second interview, he was asked a similar question and, having given Sandula his neutral position, Sperry reasonably may have felt he had to give the same response to Harrington. Clearly, any reasonable person could conclude, having been asked the same question twice by management personnel with the power to decide his employment status, that the union and his feelings about it were important to his prospective employer; that the answer given could not only affect his getting the job but could influence his future with the Company if he were hired. Notably, both Sandula's and Harrington's volunteered view, that the union supporters (troublemakers) were leaving or were gone and that Union would be ousted, indicates hostility to the Union. Sperry's decision to be "neutral" reasonably could have been influenced by these statements. Finally, Sandula's orientation advice (masquerading as a warning in my view) could reasonably tend to coerce and interfere with Sperry's right as an employee to support or not support the Union or engage in concerted activities for his and other employees' mutual aid and protection. Sandula's advising Sperry not to talk to either side is in total context an unreasonable interference with Sperry's Section 7 rights. I would find that the Respondent violated the Act in its dealings with Sperry. *Little Rock Electrical Contractors*, 336 NLRB 146 (2001).

<sup>64</sup> The Respondent admits that Harrington was employed as a supervisor in its enclosure fabrication department. Harrington did not testify at the hearing.

<sup>65</sup> Sperry stated that at the two preemployment interview sessions, he met with Sandula and Harrington alone. At the orientation session, there was another new hire, whom Sperry did not know, in attendance.

<sup>66</sup> In its brief, the Respondent does not accurately deal with Sperry's second interview with Harrington. Rather, it attributes to Harrington Sandula's comments made to Sperry in the orientation session. The Respondent, therefore, has omitted its argument with respect to the statements Sperry said were made to him by Harrington in the second interview.

*f. The implied detrimental impact on employee evaluations for wearing a union T-shirt (subparagraph 8(i))*

The General Counsel called Dukarski who testified that Binder, as his immediate supervisor for the entire time he has been with the Company, gave him his semi-annual performance evaluations. According to Dukarski, Binder's usual practice at evaluation time was to pull him aside to a private area of the plant, usually the breakroom, and discuss his performance for any given past 6-month period. In the end, Binder would give him for his and Binder's signature a performance evaluation form that stated his ratings in 11 performance-related areas. Based on the evaluation by Binder, Dukarski stated he would be given a wage change, usually for him a raise, derived from a predetermined available amount.

Dukarski said that he was due for a performance evaluation on or about August 31, 2000, and Binder, following his usual procedure asked to meet with him in the breakroom to discuss the matter. On the way to the breakroom, Binder told him that he (Dukarski) had gotten so close to his evaluation, but then he had worn "that union T-shirt" and he (Binder) could not do anything more for him for that evaluation. According to Dukarski, he made no response to the statement and the evaluation session then took place. While discussing the categories individually, Binder told him that his excessive talking with other employees had affected his evaluation. Dukarski admitted that he had been spoken to about talking during work on two previous occasions by management.

Dukarski said that he felt that he received a lower raise on the evaluation<sup>67</sup> because he had worn a union T-shirt to work to show his support for the Union about a week before the evaluation, that he had worn it all day that day.

Binder denied making the statements attributed to him by Dukarski. Binder acknowledged that he had seen various employees wearing T-shirts and buttons supportive of the Union; however, he could not remember whether Dukarski wore a T-shirt.<sup>68</sup> However, Binder said that he had never told any employee that they could not wear these items, nor were they ever disciplined for wearing them. Binder stated that he knew that basing an employee's evaluation on whether he had worn a union T-shirt was illegal.

The General Counsel argues that the Respondent, through Binder, violated the Act in his dealings with Dukarski much as he did in the incident with Stack, since here, too, his remarks to Dukarski reasonably tended to interfere with Dukarski's Section 7 rights.

The Respondent, stressing Binder's credibility over Dukarski's, argues that Binder did not make the offending remarks, that there was no corroborating proof that Dukarski even wore

a union T-shirt, and that Dukarski did not suffer any detrimental impact on his performance evaluation.<sup>69</sup>

As before, I would first credit Dukarski's testimony and conclude that Binder made the remarks Dukarski attributed to him.<sup>70</sup> Regarding 8(a)(1) violations, the Board's test for determining such violations does not turn on the employer's motive, or the success, or failure of the attempted coercion. Rather, the test is bottomed on whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146 (1959); and *Roadway Express, Inc.*, 250 NLRB 393 (1980). I conclude that the remarks by Binder conveyed the message to Dukarski that if he had not worn the union T-shirt the week before his evaluation, Binder could have done more for him in the performance evaluation. The statement implied that by wearing the T-shirt, Dukarski's evaluation was adversely affected and possibly he received a lower raise because of his wearing of the union T-shirt. I would conclude that Binder's comments were coercive and, under the circumstances, reasonably tended to violate Dukarski's rights under the Act.

*g. The February 8, 2001 strike letter to employees (subparagraph 8(j))*

The complaint alleges that the Respondent issued a letter to its employees essentially informing them that they were required to report for work regardless of a strike if they valued their employment and that the employee's failure to report for work during a strike, and/or even not participating in picketing, would be considered by the Respondent to be engaging in the strike and subject them to permanent replacement.

It is undisputed that on or about February 8, 2001, the Respondent posted and distributed a notice to its employees entitled "If There Is a Strike"<sup>71</sup> at its plant facilities. The notice in

<sup>69</sup> The Respondent points out that Dukarski received from Binder in the prior 6 months' evaluation—February 28, 2000,—essentially the same percentage wage increase as he did in August 2000. I do not find this point persuasive for purposes of the 8(a)(1) charge in question. It is the coercive nature of the statement, not the results, that controls the issue.

<sup>70</sup> I note that Binder stated that the main factor (in the evaluation process) is attendance, and "there were several different classifications in the performance of how that individual performs." (Tr. 861.) However, he did not explain how these or other factors were applied to Dukarski to justify the evaluation he gave him. Thus, in view of his prior conduct with Stack, and this somewhat inchoate explanation of Dukarski's evaluation, I found his denials regarding Dukarski's having worn the union T-shirt unpersuasive.

<sup>71</sup> See GC Exh. 21, which includes the notice in its entirety. The notice was printed on the Respondent's letterhead and was signed by Fred May Jr., as president. Note also that the Respondent mailed a letter to all employees and their spouses about a week after the February 8 notice. (GC Exh. 22.) Among other things, this latter letter indicated that the Union threatened the Respondent with a strike if no agreement was reached by February 1, 2001. The letter goes on to say "if a strike occurs [the Respondent] will continue to operate—employees will be encouraged to work and strikers will be permanently replaced." It should be noted that this latter letter is not the subject of any complaint allegation.

<sup>67</sup> Dukarski's August 31, 2000 evaluation is one of several of his evaluations covering the period May 27, 1999, through September 11, 2001. See GC Exh. 36.

Dukarski received a raise of 26 cents out of an available amount of 50 cents on August 31, 2000.

<sup>68</sup> Binder claimed that Dukarski was not really one to wear T-shirts and pins as compared to employees Stack and Kennedy, who regularly wore union paraphernalia.

pertinent (excerpted) part provided the following information to the Respondent's employees:

1. The Company will continue to operate.
2. Employees who wish to work will be encouraged to cross the Union's picket line.

3. *NOTICE TO STRIKERS*

The Company will immediately take steps to *permanently* replace you with a new worker.

When you go on strike all of your company provided benefits (including health care) will *stop immediately!* Current COBRA rates for striking employees to continue health care are

[Rates provided for families, couples, and singles]

You will *not* be entitled to unemployment benefits while you are on strike.

....

5. *If a strike occurs all vacations will be cancelled immediately. If you do not come to work, and even if you do not participate in any picketing, you will be considered to be on strike and be subject to replacement.* Exceptional circumstances could result in an excused absence, but only if you seek specific approval from [the personnel director]

...

6. *Make no mistake about it—if you value your job and your continued future at Saginaw Control [ampersand] Engineering you must come to work regardless of a strike!*

The Act, of course, confers upon employees the right to organize in Section 7 and the right to strike in Section 13.

The General Counsel argues that the Respondent's posting and distribution of this notice was violative of the Act because the notice goes beyond mere predictions of what may happen in the event of a strike, but actually threatens employees in an overly broad fashion with permanent loss of their jobs by implication and reasonable inference even if they are engaging in an unfair labor practice strike as opposed to an economic strike. The General Counsel also submits that given the number of unfair practices committed by the Respondent prior to the posting, its unqualified statement that it would immediately and permanently replace any striking (both actual and perceived) employee constitutes an unlawful coercive threat to employees who may be off of work with approved leave and/or for legitimate cause and/or who may not even have received a copy of the notice.

The Respondent counters, arguing that the notice in pertinent part is protected speech under Section 8(c) of the Act inasmuch as the language deemed offensive contained no threats of reprisal, force, or promise of benefit. The Respondent, in essence, argues that the notice was consistent with the extant Board precedent governing permissible employer speech in the context of an economic strike to which action the notice was directed.

It should first be noted the notice does not make any clear distinction between economic and unfair labor practice strikes. Throughout the letter, which I have carefully considered, there are numerous references to the word "strike" but nowhere is there a qualifying reference to economic strikes or strikers.

There likewise is no reference to unfair labor practice strikes or strikers. Reduced to its essence, to me, the clear thrust of the Respondent's (explicit and implicit) message in the notice is if a worker strikes, irrespective of the reason, or even by his absence from work appears to be striking, he will be replaced permanently. Thus, the Respondent's notice does not in my view limit itself to economic strike scenarios. Therefore, the principal case relied upon by the Respondent, *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982), is inapposite.<sup>72</sup> In my view, the instant notice in effect tells employees that they cannot or better not strike for any reason; and this is patently illegal. *Caterair International*, 309 NLRB 869 (1992). The notice also, in its overbreadth, to me, goes one step further by informing employees that the employer, not they or the Union, will determine whether they are indeed on strike because their mere absence from work during a strike will be deemed by the Respondent to be strike participation. Any exceptions would in likewise be determined by the Respondent. Thus, in effect, the Respondent here, has deemed itself the arbiter of rights conferred by the Act on employees or their representatives. It is hard to imagine a more coercive or egregious interference with employee rights than this notice, especially in the context of the many unfair labor practices committed by the Respondent prior to its promulgation. I would find a violation of the Act.<sup>73</sup>

*h. Plant Manager Simms' removal of union posters while allowing the posting of other materials (subparagraph 8(k))*

The complaint essentially alleges that admitted supervisor/agent and Respondent's plant manager, Jerry Simms, required employees to remove union posters from their lockers while allowing other materials to remain posted.

Kennedy was called to support this allegation. Kennedy recalled an incident with Simms and stated that around the beginning of May 2001, he was asked by Simms to remove three posters affixed to three sides of his locker. The posters proclaimed, "We Support the United Steelworkers." Kennedy stated that he had put these posters up around the end of April

<sup>72</sup> *Baddour, Inc.*, 303 NLRB 275, 279 (1991). The employer in *Eagle Comtronics*, supra, had stated "that in the case of an economic strike . . . present employees could be replaced with applications on file." In *Eagle Comtronics*, the Board held that an employee does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike "[u]nless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with threats." Moreover, basically, as long as the employer's statements on job status after an (economic) strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act. Here, the Respondent's notice does not meet this crucial point of *Eagle Comtronics*.

<sup>73</sup> I agree with the General Counsel's contention that even if the notice could, arguendo, be construed to be referring solely to an economic strike, nonetheless it clearly tells employees that not only may they be replaced but threatens unlawfully to discharge them as a result of strike activity. Contrary to the Respondent, I would conclude that the Respondent has not satisfied the requirements of *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), which I believe governed in substantial part the issue here. See also *Consec Security*, 325 NLRB 453, 457 (1998).

2001 but also had previously posted stickers supporting the Union. Kennedy stated that during this time other employees had posted National Rifle Association, Right to Life, and (race-car driver) Dale Earnhardt stickers and posters on their lockers.

According to Kennedy, he questioned Simms about the request and was told by him that he (Simms) wanted to keep out any signs supportive of or against the Union; that he was ordering everyone to take down these posters as he did not want them in the shop. According to Kennedy, Simms told him if you guys want to battle it (the union issue) outside of the shop, that would be fine with him, but not in the shop. Kennedy stated that Simms was polite to him and he complied with Simms' request. However, Kennedy said that he told Simms that he (Kennedy) would check on the legality of Simms' request because he thought it was his right to support the Union in this fashion. Kennedy also stated that Simms did not ask the employees to remove other nonunion-related signs or stickers from their lockers.<sup>74</sup>

Simms readily admitted that he requested Kennedy to remove the union posters in question from his locker but denies telling or ordering him to do so. Simms also acknowledged that over the past couple of years, he has had employees remove procompany as well as prounion paraphernalia from different locations in the plant. According to Simms, he actually ordered removal of procompany materials because he thought he was at liberty legally to do this. However, he always asked or requested that prounion materials be removed because he was unsure of the law on this point. Simms stated that, generally, he ordered removal of any items he deemed controversial enough to affect production.<sup>75</sup> According to Simms, Dale Earnhardt stickers were not controversial, although he admitted that even these could become controversial if, for example, employees believed Jeff Gordon (another popular stock car driver) was a better racer.

It is well established by the Board and the Courts<sup>76</sup> that in the interest of maintaining production and workplace discipline, employers can lawfully impose restrictions on workplace communications among employees. However, where employers allow workers to post items of interest, it may not impose content-based reductions that discriminate between postings of Section 7 matters and other postings. *Vons Grocery Co.*, 320 NLRB 53, 55 (1995). Furthermore, the employer may not remove union literature while leaving other posted items of a personal and/or non-business nature. *Kroger Co.*, 311 NLRB

1187 (1993). Moreover, the Board has held employers liable under Section 8(a)(1) by restricting the distribution or posting of materials they consider libelous, defamatory, scurrilous, abusive, or insulting, or which would tend to disrupt order, discipline, or production in the plant as they could be construed as applying to union literature. *National Steel Corp. v. NLRB*, 625 F.2d 131 (6th Cir. 1980).

The Respondent does not take issue with Kennedy's version of the incident with Simms. Rather, it argues that Simms merely requested, did not order, Kennedy to remove the posters and politely explained to him his reasons—the posters were so controversial that they would have disrupted production in the work areas where Kennedy's locker happened to be located. Accordingly, the Respondent argues that there was no violation; that Simms was even justified in his actions even if he had ordered Kennedy to remove the posters. However, he did not, and Kennedy complied with his request.

The General Counsel argues that, irrespective of Simms' purported polite request, Kennedy was unlawfully coerced to remove his union posters and, accordingly, his Section 7 rights were interfered with.

I would agree with the General Counsel and would find a violation. I note that the Board requires a showing of objective evidence, that of special circumstances, that would support the employer's belief that a ban (on employee postings) was necessary to maintain production, decorum, and discipline in the workplace. *Midstate Telephone Corp.*, 262 NLRB 1291, 1292 (1982); and *United Aircraft Corp.*, 134 NLRB 1632 (1961).

Here, clearly, the Respondent allowed the posting of various nonbusiness-related posters and stickers on the employees' lockers. It reserved to itself the right to remove so-called "controversial" matter deemed to affect adversely production. However, the record here does not support any finding of special circumstances justifying Simms' action.

Simms did not specifically speak to ongoing incidents or scenarios at the plant that could serve as objective evidence (special circumstances) that Kennedy's posters did or could have caused or was causing specific production problems. He merely deemed the posters controversial and, therefore, in his view, production could be affected. That he interceded in the past when provocative calendars were posted and on the occasion of the Bush-Gore election (which surely was controversial by any standard), does not establish that production at the plant is affected by deeming certain matters controversial, especially when the Respondent appoints itself as the sole arbiter of what is or may be controversial. I am also not impressed by Simms' having requested as opposed to ordering Kennedy to remove the posters. In agreement with the General Counsel, Simms as plant manager, and Kennedy's ultimate supervisor, in context was coercive in spite of Simms' choice of words or even his polite demeanor. Moreover, Kennedy may have complied with Simms' request, but he did so only reluctantly. Hardly can it be said that there was no element of coercion in Simms' behavior under the circumstances. I would find a violation in this instance.

<sup>74</sup> According to Kennedy, around 2 months before the November 2001 hearing, employees' lockers were moved from a work area to the break area. Since the move, employees continue, without objection from management, to keep the Earnhardt and other stickers on their lockers.

<sup>75</sup> Simms cited as examples of controversial matters, provocatively illustrated calendars, and the controversy over the 2000 presidential election which caused him to step in and control the employees' behavior. According to Simms, when controversy affects production, he believes it is his place to step in and eliminate it.

<sup>76</sup> See *Republican Aviation Corp. v. NLRB*, 324 U.S. 793, 804 (1945); *National Steel Corp. v. NLRB*, 415 F.2d 1231 (6th Cir. 1969); and see also *Container Corp. of America*, 244 NLRB 318 fn. 2 (1979). Unions have no statutory right to post notices on employers' premises.

*i. The alleged coercive surveillance of union activities  
by Troy Henk (subparagraph 8(l))*

The complaint essentially charges that on or about June 13 and/or 14, 2001, Henk coercively surveilled employees engaged in union activities, and by his presence lent his—and the Respondent's—support to an effort by employees to decertify the Union as the exclusive collective-bargaining representative of the Respondent's employees.

[By way of prefatory note, this allegation relates to a previously discussed allegation charging the Respondent with disparately enforcing its no-trespassing charge on August 16, 2000. Accordingly, I will not restate the factual scenario, except in a limited way.]

It may be recalled that employees Jarvela, Dukarski, and Stack, as well as Henk, testified about events of June 13 and 14, 2001. It is beyond dispute that there was a decertification effort being undertaken by certain of the Respondent's employees who opposed the Union. The question is whether admitted Supervisor Henk, who clearly was on the scene on both occasions, was or could be said to be surveilling union activities of the employees and/or by his mere presence lent the Respondent's support to the decertification effort.

The General Counsel argues that Henk knew, in spite of his denials, that Sopcak and the others with the clipboards were gathering signatures for the decertification effort and, by standing within about 5 feet from them, not only surveilled employees presumably making decisions to sign or not sign the petitions, but also lent the Respondent's support to the decertification effort.<sup>77</sup>

The Respondent contends that Henk, following his personal habit, was merely smoking a cigarette on both days before punching in for work, and noticed something was going on but was not sure. Henk was uncomfortable about the goings-on and left the area. The Respondent submits that Henk was neither surveilling nor lending his support to what turned out to be a decertification effort by certain employees.

First, I do not believe Henk's denials of knowledge of the nature of the activity he observed on June 13 and 14. It seems clear and unavoidably so that anyone observing Sopcak and the others with the clipboards (on two occasions) would know what they were about. The question remains whether the few minutes Henk spent smoking and watching the scene is tantamount to an unlawful surveillance; and whether his presence for these short periods could reasonably be construed to be lending support to the decertification effort, and thereby unlawfully interfering with the employees' right to organize.

I am inclined to agree with the Respondent that Henk's conduct on the day in question does not constitute unlawful surveillance. The Board test for determining whether an

employer has created an impression of surveillance or indeed is surveilling employees is whether the employee(s) would reasonably assume from the behavior that their union activities had been placed under surveillance. *Fred'K Wallace & Son, Inc.*, 331 NLRB 914 (2000). *United Charter Service*, 306 NLRB 150 (1992). That test, in my view, has not been met with respect to Henk's involvement in the collection of signatures by the antiunion employees.

Also, even crediting the testimony of the three employees, Jarvela, Dukarski, and Stack, I do not believe that Henk, by standing near the collectors of signatures, engaged in the type of conduct that would constitute lending support to the decertification effort. It seems clear that Henk, although close to the group of collectors, did nothing overt to encourage employees to sign the petition. I believe at most he was merely present at the scene and, without more, mere presence at or near the scene of the collection of decertification signatures, cannot reasonably be construed to be lending support for purposes of Section 8(a)(1). I would recommend dismissal of this aspect of the complaint.<sup>78</sup>

*C. The 8(a)(3) Allegations*

The complaint alleges, in paragraph 9, nine separate violations of Section 8(a)(3) by the Respondent in calendar year 2000. Before discussing these charges, it is helpful first to discuss the legal principles applicable to 8(a)(3) violations under the Act.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term of condition of employment, to encourage or discourage membership in any labor organization. 29 U.S.C. §158(a)(3).

Preliminary to determining whether an employer has discriminated against an employee in violation of Section 8(a)(3) or (1) of the Act, the Board has held that the General Counsel must first make a prima facie showing sufficient to support the inference that the protected activity(ies) of the employee was a motivating factor in the employer's decision affecting any term or condition of the employees' employment. If this is established, the burden then shifts to the employer to demonstrate that the action would have occurred irrespective of whether the employee was engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances proved. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge of that activity,

<sup>77</sup> I should note that the General Counsel actually did not address this charge much at all in his brief. However, he argues most forcefully that Henk and, hence, the Respondent knew of the decertification effort. However, as I read his brief, nothing is said about surveillance and lending support to the effort. Nonetheless, based on the General Counsel's brief in its entirety and his generally postulated theory of the case, I have chosen to articulate his position as stated above.

<sup>78</sup> As I have previously found, I believe management was informed of the signature collection, in all likelihood, by Henk and disparately and discriminatorily did not invoke the "trespassing" rule against the collectors. This finding, in my view, has a more appropriate application to the 8(a)(5) violations and will be discussed later.

animus, and adverse action against those involved, which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inference of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Services Co.*, 309 NLRB 23 (1992).

Once the General Counsel has made a prima facie case, the burden shifts back to the employer. That burden requires a respondent “to establish its *Wright Line* defense only by a preponderance of evidence.” The respondent’s defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merilat Industries*, 307 NLRB 1301, 1303 (1992).

With these legal principles serving as a backdrop, we turn to the allegations, the witness testimony and my conclusions regarding each.

#### 1. The Greg Kennedy allegations

In subparagraphs 9(a), (b), (d), and (i) of the complaint, the Respondent is charged with committing violations of Section 8(a)(3) of the Act against Kennedy over a period covering about June 9 through October 16, 2000. Kennedy testified about these matters.

Kennedy stated that the day after the election, Binder assigned a local delivery to him at around 7 a.m. Kennedy said he returned to the plant at around 9:30 a.m., whereupon Binder told him to report to the assembly department. According to Kennedy, in the succeeding days, he did less and less local driving and it was clear to him that the other drivers who customarily did the long distance deliveries—the stake truck and semidriviers—were making the local deliveries in his place. Kennedy said that prior to the election, the only time other drivers made local deliveries was when he was not available; he, alone, usually made the local deliveries daily.<sup>79</sup> According to Kennedy, after the election, Binder assigned him some local deliveries but other drivers were regularly given this assignment. Kennedy stated that he made only five deliveries between June 9 and July 5, 2000. However, after July 5, Binder gave him more deliveries on a regular basis. Kennedy stated that after August 2, he made no deliveries.<sup>80</sup> According to

Kennedy, prior to the election, Binder never assigned anyone else to make local deliveries when he (Kennedy) was present and available.

Kennedy testified that on June 20, 2000, he was formally written up by Binder for allegedly violating the Company’s work rules.<sup>81</sup> He explained the circumstances of the writeup. According to Kennedy, he had just returned to the shop at around 4:23 p.m., having picked up another driver who had left a company truck at a repair shop. He stated that he was washing his hands at the paint area restroom sink when several painters<sup>82</sup> standing nearby asked him what was the Union’s next move (its having won the election). Kennedy said he told them that they would be receiving an explanatory letter from the union bargaining committee. Then, the paint line supervisor, Steve Walker, approached the group and asked the painters to come with him. According to Kennedy, he saw Walker speaking to Binder at about 4:27 p.m. and heard him say to Binder that Kennedy had been talking to the guys at the sink.

Later the next day, Kennedy said Binder approached him at his locker and handed him the writeup. Kennedy stated he told Binder he disagreed with the alleged violation and wrote a response on the form.

Kennedy testified that his tour of duty ended at 4:30 p.m. and it was customary before June 20 for employees to wash up at the end of their shift and converse with one another about nonwork-related matters. Moreover, according to Kennedy, supervisors, including Pagano, Brian Peterson, Walker, and even Binder, off and on have been present on these occasions.<sup>83</sup> Kennedy said he had previously never been reprimanded or disciplined about nonwork-related conversations at the sink nor had anyone else to his knowledge.

Kennedy stated that at about 8 a.m. on August 2, 2000, he and Binder were on the loading dock and Binder asked him about the dates he and other union representatives were to attend a union convention. In the course of this conversation, according to Kennedy, Binder said that he was sure that he (Kennedy) knew the Company was against unions, that the Company would do what it had to do to protect itself. Binder asked whether he (Kennedy) had thought about the consequences of his actions. Kennedy said he told Binder that he had.

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pretty much reinstated back to driving.” (Tr. 129.) Also, Kennedy admitted that Binder, after the election, scheduled him for truckdriving. (Tr. 221.)

<sup>81</sup> See GC Exh. 14. This writeup accused Kennedy of violating the following rules: refusal to observe department working hour scheduling; loafing or sleeping or other abuse of time during working hours; interfering with any employee’s performance of duties by talking or other distractions; and delaying or restricting production or coercing others to delay or restrict production. These rules appear in the Respondent’s handbook.

<sup>82</sup> Kennedy identified the painters as Dave Unger, Rob Henry, Alan Thousand, and Larry Value. Kennedy noted that there was a wash sink in his assembly area; but he sometimes used the paint area sink.

<sup>83</sup> Kennedy cited as example conversations he had with the Warehouse Supervisor Peterson about automobiles; Binder and he talked about vacations; Walker about hunting, and Mike Pagano about bowling.

<sup>79</sup> Kennedy stated that during the period covering February 1999–June 8, 2000, he was the exclusive driver for local deliveries except when he was not available or when on vacation; he drove 5 days per week. Kennedy admitted that on most occasions during this time, he did not drive a full day and, when not driving, he worked mainly in the shipping, packaging, or assembly departments.

<sup>80</sup> Kennedy’s testimony on this point is somewhat confusing and inconsistent inasmuch as he also testified that “[on] July 5 [2000] I was

Then, another driver pulled into the dock and asked Binder whether Kennedy was going to continue being the local truck-driver. According to Kennedy, Binder said as far as he was concerned, Kennedy would be the local driver.

Kennedy said he made his deliveries that morning and returned to the plant at about 11 a.m. On his return, Kennedy said that Binder asked to speak with him privately in the freight area. According to Kennedy, Binder said that he had bad news for him—the Company was removing him from the pickup truck duties because of a conflict of interests. Binder explained that management determined that Kennedy could not represent the Company (by driving the truck, which had the company logo affixed) and also represent the Union. Kennedy said Binder asked him to turn in the keys to the truck and put his uniform in his locker. Binder then informed him that his new hours were 7 a.m. to 3 p.m.; he would be classified as a general laborer-loader.

According to Kennedy, his usual hours were 6 a.m. to 4:30 p.m. when he was driving and he usually picked up some overtime, especially on Saturdays. After he was removed from driving, he earned no overtime.

Kennedy said that on about September 2, 2000, he spoke to Mike Pagano<sup>84</sup> about overtime. According to Kennedy, he had heard an announcement that all workers were required to work overtime that Saturday. Kennedy said he asked Pagano if he was required to work, as he had not heretofore been getting overtime assignments. Pagano said he would check with Binder and proceeded to Binder's office. According to Kennedy, Pagano returned to him and said that Binder had said that he (Kennedy) knew what his schedule was and he was not allowed any overtime.

On about October 16, 2000, Kennedy was given a performance evaluation by Binder, as a result of which he received no raise for the period covered by the evaluation.<sup>85</sup> Kennedy stated that especially he did not agree with Binder's written comments that he had been in areas of the plant where he was not assigned and interfered with the work of other employees.<sup>86</sup> Kennedy stated he also disagreed with Binder's comments that he had been warned about excessive talking in the past. According to Kennedy, the only talking-related discipline he had received was the June 20 matter at the painters' wash sink.<sup>87</sup>

<sup>84</sup> Pagano was and is an admitted supervisor in the Respondent's assembly department. Pagano did not testify at the hearing.

<sup>85</sup> Kennedy's October 16, 2000 evaluation is contained in GC Exh. 16. The evaluation period covered roughly April–October 2000. According to the evaluation form, Kennedy was not entitled to any available moneys for a wage increase; his current wage is \$11.60 per hour. Kennedy received other performance evaluations; that is, on April 20, 2000 (GC Exh. 17), he received an 8 cents raise; on October 8, 1999, he received a 27 cents raise (GC Exh. 18); and April 21, 1999, he received a 29 cents raise (GC Exh. 19).

<sup>86</sup> Kennedy admitted prior disciplines for sexual harassment. However, on cross-examination, he admitted that he had received a writeup from Binder on January 24, 2000 (which he signed with no response), charging him with interfering with other employees by excessive talking. Binder warned him then that continued behavior could result in suspension or worse. (See R. Exh. 4.)

<sup>87</sup> Kennedy also acknowledged that he had a conversation with Plant Manager Simms about a week before the June 21 writeup wherein

Kennedy disagreed with the entire evaluation, complaining that the top wage rate for his laborer's job was \$12.88 per hour and yet the evaluation form indicated there was no money available to him for a raise.

For purposes of *Wright Line*, supra, in my view, little need be said as to whether the General Counsel had met his initial burden to establish a prima facie case of unlawful discrimination or retaliation against Kennedy.

Beyond a doubt, and conceded by the Respondent as well, Kennedy's support of, status and involvement with the Union, and the Respondent's knowledge thereof, cannot be assailed. That the Respondent, including Kennedy's supervisor, Binder, exhibited hostility to the Union pre and postelection, in my view, is also amply demonstrated on this record.<sup>88</sup> To be sure, Kennedy, at least prima facie, suffered detriments to the terms and conditions of his employment with the Respondent. I would conclude, therefore, that the General Counsel has met his *Wright Line* burden with respect to the Kennedy allegations. We turn to the Respondent's defense.

The Respondent concedes that Kennedy was removed from his pickup truck driving but that he was removed because he used the company truck for nonwork-related reasons during work hours. The Respondent submits that his union status and involvement had no part in this decision.

The Respondent points to three occasions on which Kennedy abused the Respondent's trust in the use of the vehicle. Binder admitted that he wrote Kennedy up on July 31, 2000, based on one of his supervisor's observations of Kennedy's misusing the company truck on July 27, 2000, and advised him in the written warning that he and the plant manager would review his performance to determine if he should be removed from the local driver position.<sup>89</sup> According to Binder, Kennedy denied the accusation. However, Binder stated that this was not the first time Kennedy had misused the truck. Binder stated that on one prior occasion, the company truck was observed at a residence later determined to be the home of Kennedy's sister. According to Binder, Kennedy at first denied this charge also but later

Simms "got in his face," but denied he was warned about excessive talking.

<sup>88</sup> As noted, I have previously found many instances of violation of Sec. 8(a)(1) by the Respondent by and through its agents and supervisors. These findings alone, in my view, serve as strong evidence of the Respondent's animus. Of course, there are other instances specific to Kennedy, such as the president of the Respondent being overheard by an employee, Michael Leach, in September 2000, saying that as soon as the Union was gone [Kennedy] would be gone too (Tr. 748–49); and Kennedy's being reportedly described as a troublemaker by one of the Respondent's attorneys in the context of contract negotiations in 2001.

<sup>89</sup> The write-up is contained in R. Exh. 25. It should be noted that Kennedy was observed operating the vehicle on July 27, 2000, by another supervisor, Romanelli, who testified at length about the circumstances of his following Kennedy, who was ostensibly on the clock, and discovering that Kennedy was meeting another man at a (Bay City, Michigan) strip shopping mall which happened to be where the union hall was located. Binder stated that Kennedy should have been making a delivery in an entirely different place from where he was seen.

admitted he was there and promised not to repeat this behavior.<sup>90</sup>

Binder said that he discussed with Simms whether Kennedy would continue driving locally and then later advised Kennedy that the Company would reevaluate whether he was going to continue in these duties. Binder admitted that Kennedy's driving eventually ceased (in August) and he was assigned to an 8-hour fixed schedule shift as a general laborer.<sup>91</sup>

Simms also testified about Kennedy's removal. Simms stated that he was involved in the decision, which was mainly based on Kennedy's being seen at the strip mall. According to Simms, he and Binder decided in late July or August that it was best to transfer Kennedy to another department. Simms noted that the pickup duty was not a full-time position in any case, the truck being used only on an as-needed basis. Consequently, he now assigns someone to make these local deliveries on an ad hoc basis.

The Respondent principally argues that Kennedy's June 20 discipline was justifiably based on his standing at a wash sink in the paint area—which was not Kennedy's assigned work area—discussing the Union during work hours, and not because of his union status or involvement. The Respondent contends that Kennedy's claims, that he was simply using the most convenient bathroom and that it was a common practice of employees to converse while washing up at the end of the day, offer no justification to essentially depriving the Company of both his labor and that of the other workers with whom Kennedy was conversing.<sup>92</sup> The Respondent also points out that this was the second time within a week that Kennedy had been reminded about his excessive talking.

Regarding Kennedy's being denied overtime opportunities since August 2, 2000, by Binder and Pagano, the Respondent contends that when Kennedy was removed from the truck driving assignment and was assigned to the laborer's job, there simply was not enough available work for Kennedy to be given overtime in the assembly department.

Plant manager Simms testified on this point. According to Simms, from the end of calendar year 2000 through the first part of calendar year 2001, there was a decline in hours worked by the employees<sup>93</sup> because during this period, the Company

received fewer orders for enclosures. Simms also stated that the Company purchased in December 2000 a new automatic gasket machine which was put on line in January or February 2001. According to Simms, this machine produced significant labor savings in the assembly department because it replaced another manual gasket installation process. Simms stated that in addition to the hourly labor savings realized by the new machine, some employees were redeployed in the plant. Simms also stated that near the end of January 2001, the Company installed a new automated welding machine that produced new labor saving efficiencies in that area of the Company's operation.<sup>94</sup> Simms stated that the installation of these machines did not happen at once, but was a phased operation. Accordingly, workers were kept busy by reassignment to other jobs. Simms noted that 2001 was, in spite of all this, still a down year for the Respondent.<sup>95</sup>

Binder admitted that when Kennedy was driving prior to August 2000, he was scheduled for and worked 10 hours per day. However, according to Binder, when Kennedy was transferred to assembly (with no driving), his hours were indeed reduced but only because the Company's work load decreased; that this turn-down in work had commenced in the department before Kennedy's full-time and exclusive assignment there. According to Binder, Kennedy worked only 8 hours per day during the time he supervised him.<sup>96</sup>

Romanelli stated that he began his supervision of Kennedy around August 20, 2001, when he was assigned from welding to the assembly department. According to Romanelli, Kennedy worked no more or less than any other employee in his department, generally 45–50 hours per week. Romanelli stated that these hours had fluctuated since August 2000, based on the changes in the flow of work.

The Respondent submits that Binder credibly testified about his performance evaluation criteria. Binder testified that the main factors for evaluation were attendance and "several different classifications" in the performance of the worker.

Conceding that Kennedy's October evaluation was rather poor, the Respondent submits that it, nonetheless, was deserved because of Kennedy's 22 hours of missed work and 10 hours of work lost due to discipline. Moreover, Kennedy received a very low mark in attitude—"0"—a "1" in four other performance categories, and he received a "2" in the remainder."<sup>97</sup> The Re-

<sup>90</sup> Binder actually stated that Kennedy had misused the truck on two other occasions. He only recited this example, and he produced no documentation to support the incident.

<sup>91</sup> Although Kennedy admitted driving the company truck on July 27, he denied misusing the truck and specifically denied being seen at the Bay City mall. Kennedy acknowledged that if he were doing union business in the company truck on company time, this would present a conflict of interest, the reason he was told he was being taken off local driving by the Company.

<sup>92</sup> The Respondent did not at the hearing, or in its brief, deal with what discipline, if any, was received by the painters with whom Kennedy was allegedly wasting time. I assume these individuals were not disciplined.

<sup>93</sup> Simms produced a document he prepares and uses as part of his management duties at the plant. See R. Exh. 26. This document covers the period November 2, 1995, through October 15, 2001. According to Simms, each hash mark on this document represents 1 workweek in a given month. He claimed that during this time there was a 5000–6000-hour reduction per week in hours plantwide.

<sup>94</sup> Simms produced another document showing the total number of hours in the welding department covering November 22, 1995, through November 5, 2001. See R. Exh. 28. This document, according to Simms, shows along the baseline a general decline from 5500 hours to 3300 hours per week. Here, too, according to Simms, these figures reflect workload and efficiencies, including those produced by the new welding equipment.

<sup>95</sup> Simms produced a document he prepared showing the amount in pounds of steel (used to make the enclosures) the Company purchased and used in calendar year 2000 and 2001. See R. Exh. 27. By December 2000, the Company had used 19,883,000 pounds and, by the end of December 2001, the Company had used 16,026,490 pounds of steel, about 4 million pounds less. According to Simms, these amounts of steel correlate to orders received by the Company.

<sup>96</sup> Binder ceased supervising Kennedy around June 2001.

<sup>97</sup> The performance evaluation form includes a grading scheme which includes a 3 for exceeding expectations; a 2 for meeting expecta-

spondent submits that Kennedy was fortunate that he retained his current rate of pay and not given a decrease in his pay. The Respondent points out that during the evaluation period in question, Kennedy had been caught three times misusing the company truck and was disciplined for this, and lied about his involvement in two of the incidents, and was disciplined for wasting time and interfering with other working employees.

#### Discussion and Conclusions of the Kennedy Allegations

I would find and conclude the following.

That the Respondent did not unlawfully change Kennedy's driving schedule and regular work assignment.

As I have previously found, the General Counsel established prima facie a violation of the Act with respect to this allegation. Specifically, I have given considerable weight to Binder's testimony in which he stated that shortly after the election, he decided to reevaluate Kennedy's truck-driving duties and told Kennedy as much. I believe this decision, coming about 1 day after the successful union campaign in which Kennedy had an open and well-known supporting and activist role, supplies the necessary antiunion and discriminatory motive required by *Wright Line*.<sup>98</sup> However, it is clear, contrary to the complaint allegation, Kennedy continued in his driving duties from June 9 through July 5, 2000, although in a reduced way. Then Kennedy himself admitted that after July 5, he was "reinstated" to his driving duties. In the meantime, even when not driving, Kennedy said he performed his nondriving duties as usual in the packaging and shipping department. So Kennedy was clearly driving the pickup up to July 27, 2000, when he was "caught" using the vehicle on that date for nonwork-related (personal or perhaps union) business. In my view, the Respondent had ample cause to take the driving duties from Kennedy at that point, irrespective of Kennedy's union activities and status.

I note that I am not altogether convinced that Kennedy on three occasions, as argued by the Respondent, had misused the truck, but that is not controlling. Kennedy was not entitled to use the truck, in my view, to go on a frolic of his own, even one time. The Respondent was free to take that duty from him either because it viewed his behavior as a conflict of interest or simply as emblematic of his lack of trustworthiness. Accordingly, I would conclude that the Respondent has met its *Wright Line* defense, mainly that in spite of Kennedy's union involvement and status, it would have removed him from the local truck driving assignment and, correspondingly, changed his work assignment and schedule, his union activities notwithstanding. I would recommend dismissal of this aspect of the complaint.

That the Respondent did unlawfully and discriminatorily issue a written discipline to Kennedy on June 20.

As to this charge, I note once more that the Union's victory was only weeks old, and Kennedy clearly was not liked by the Respondent. Irrespective of whether, as Kennedy testified, he

was merely following his usual prepunchout ablutions at a convenient sink or whether he was talking about union or other nonwork-related matters out of his assigned work area, wasting time and what not, as argued by the Respondent, it is clear to me that he, alone, and not the other workers with whom he was talking, received a write-up, or any other discipline. This fact fatally, in my view, undercuts the Respondent's argument that the discipline was justified or fairly issued to Kennedy. On this ground alone, a case for disparate treatment because of union activities and involvement is made out. I would find a violation of the Act in this particular.

That the Respondent did unlawfully and discriminatorily deny overtime work opportunities, including Saturday overtime work opportunities, since about August 2 and September 2000, respectively, to Kennedy.

I note that the Respondent offered a persuasive case for its economic defense. It seems that the Respondent for the reasons stated, essentially a lack of or diminution in orders and the phased-in installation of new labor saving machinery, did have less overall hours plantwide for its workers. As noted by the Respondent, Kennedy, himself, as well as the other workers were working generally the same number of hours during this period and afterwards. However, the Respondent's defense overlooks a salient point. The complaint allegations charge that Kennedy was discriminatorily denied *overtime opportunities* based on a statement made by Binder and Pagano that clearly suggested that whatever overtime was or may have been available during this period, Kennedy was not going to get any. Notably, Binder did not deny that he made the statement, and Pagano who, according to Kennedy, delivered the message, did not testify. Thus, I have credited Kennedy's testimony on the question, mainly because it is unrebutted and Kennedy testified confidently about this encounter and the statements made to him.

Notably, the Respondent did not establish that there were *no* overtime opportunities at its plant during the time in question. Accordingly, again, given Kennedy's active role in the successful union campaign, his official status with the Union, the Respondent's hostility to the Union, and Kennedy in particular, I would find and conclude that the Respondent discriminatorily denied Kennedy the opportunity to earn daily overtime hours since about August 2, 2000, and on Saturdays since September 2000.<sup>99</sup>

That the Respondent unlawfully and discriminatorily evaluated Kennedy's job performance in a way that adversely impacted his opportunity for a pay increase.

It is clear that Kennedy was not a perfect employee although he seemingly was considered a good employee by the Respon-

tions, a 1 for below expectations; and 0 for unacceptable. The worker is evaluated using these numbers in 11 performance areas.

<sup>98</sup> See Tr. 865, Binder's testimony regarding his testimony regarding his proposed reevaluation of Kennedy's driving duties.

<sup>99</sup> I am not making a finding that the Respondent actually had or provided overtime hours to its workers during this period. The charge and my finding go solely to opportunities that may or may not have been available to the workers during the period in question. My order on this point will order a cease and desist to denying Kennedy overtime opportunities. I leave to the compliance stage of these proceedings to determine whether there were appropriate opportunities during the periods in question and what, if any, make-whole amount is appropriate.

dent's management. Examining Kennedy's prior evaluations<sup>100</sup> covering the period April 21, 1999, through April 2000, I note that Kennedy's supervisor, Binder, gave him raises when he lost even more hours by missed days during those prior periods and even lost hours for lateness. Yet, according to Binder, time and attendance was a major component of the performance evaluation. Notably, in October 2000, Kennedy, for the first time in years, received probably his worst evaluation which included, for the first time, time loss to disciplinary action and, again for the first time in years, there was no wage increase available to him and, consequently, he received absolutely no wage increase. I do not believe, as argued by the Respondent, that Kennedy was such a poor employee (all of a sudden) that this evaluation was deserved. His poor evaluation, in my view, was not a coincidence. I would find and conclude that the evaluation Kennedy received on October 16, 2000, emanated from the Respondent's hostility toward the Union and derivatively Kennedy, an active supporter and official. I would find a violation of the Act in this regard.

2. The written disciplines of Herzberg, Maziarz, and Tornberg on August 4, 2000

Charles Herzberg, Tornberg, and Pat Maziarz were employed by the Respondent during the relevant period as job processing and data entry workers in its processing office.<sup>101</sup> The General Counsel called the three as witnesses. Each man stated that he received a virtually identical written discipline for violating company work rules from their immediate (admitted) supervisor, Kenneth (Ken) De Vroy, on August 4, 2000.<sup>102</sup>

Maziarz related the circumstances surrounding his discipline. According to Maziarz, another processing office employee

<sup>100</sup> Kennedy's prior evaluations are contained in the following exhibits: GC Exh. 19, April 21, 1999; GC Exh. 18, October 8, 1999; and GC Exh. 17, April 20, 2000. In these evaluations, Kennedy received all of the wage increases available to him.

<sup>101</sup> Herzberg, known as Nick, has been employed by the Respondent for about 15 years, 6 years in the processing office where he processes orders for company product and reviews blueprints and drawings for correctness and completeness. Herzberg was aware of the union organizing campaign but was not heavily involved prior to the election. After the election, he became involved with the Union and ran for a bargaining committee position but lost.

Tornberg was employed by the Respondent from June 18, 1993, through November 6, 2000. Tornberg was not involved in the organizing effort but after the election, he was elected to the union bargaining committee around July 8, 2000. He gave the position up when he quit.

Maziarz has been employed by the Respondent for about 16-1/2 years, 7 years in job processing. Maziarz claimed to be pronoun and spoke to employees about the benefits of a union prior to the election. After the election, as noted earlier, Maziarz said he openly wore union paraphernalia.

All three men worked at desks adjacent to each other in the processing office. Another employee, Mike Sopcak, was the fourth worker in this department. As will be seen, Sopcak was opposed to the Union and appeared to be a principal architect of the decertification effort.

<sup>102</sup> Tornberg's discipline is contained in GC Exh. 35; Maziarz' is contained in GC Exh. 40; and Herzberg's is GC Exh. 38. Each discipline identically states that the warned employee was "observed abusing time during working hours and interfering [sic] other employees performance by talking."

(Mike Sopcak) came to his desk the morning of August 4 at the beginning of his shift and gave him a copy of a flier highly disparaging of the Union and its officials.<sup>103</sup> Acting on Tornberg's suggestion, Maziarz said that he complained to Sandula in human resources and identified Sopcak as the distributor; he provided Sandula with the copy of the flier. According to Maziarz, Sandula asked him if Sopcak had physically given him the flier. Maziarz said he told Sandula that Sopcak had not only given the flier to him but also to his coworker, Herzberg, and two other employees visiting the area.<sup>104</sup> Maziarz said about an hour later, he, Tornberg, and Herzberg were summoned by their supervisor, De Vroy, and given written disciplines.

Maziarz then explained the circumstances directly leading to the written disciplines. On August 4, Maziarz said that he was casually talking to Herzberg during working hours about a comical intoxicated man they had seen at a local drug store. Herzberg, who was examining a blueprint, merely acknowledged the query by saying, "uh-huh." According to Maziarz, Tornberg was present but was not involved in this discussion except to turn towards him as he, Tornberg, was sipping a soda pop. Maziarz said the conversation lasted around 15-20 seconds.

According to Maziarz, Simms came in within a few moments and, addressing Maziarz, asked him if he were hard at it (work). Maziarz said he responded with a "Yes Sir." Simms then said I suggest you get hard at it. Maziarz said he again responded, "Yes Sir."<sup>105</sup> According to Maziarz, Simms did not address Tornberg or Herzberg.

Maziarz stated that shortly after Simms left, his supervisor, De Vroy, asked the workers to accompany him to the conference room. Maziarz said that Tornberg complained and said to De Vroy that this was bullsh—t and you know it and that you can go and get Simms, and that he would tell Simms the same. According to Maziarz, De Vroy sheepishly left the room, mumbling under his breath, and fetched Simms. Simms came to the conference room, at which time Tornberg repeated his statement, saying the matter was essentially "bulls—t" and maintaining that the three were not talking and laughing. In fact, Maziarz said that he told Simms that he was the one talking, not Herzberg or Tornberg. However, Simms insisted he had overheard them all laughing and talking. Maziarz said that he had never received any discipline for talking prior to August 4, 2000, or since, and, in fact, had never received any written discipline in 16 years with the Company.

Maziarz also stated that prior to this incident with Simms, nonwork-related conversation took place daily among and between both hourly workers and supervisors as well, without consequence. Maziarz said that he has talked on the job about golf and other sports, hunting, and life in general with De Vroy, Simms, and even May, on various occasions throughout his career. According to Maziarz, De Vroy was well aware that these kinds of conversations were a staple in the processing

<sup>103</sup> This flier is contained in GC Exh. 20.

<sup>104</sup> Sopcak also worked in the processing section.

<sup>105</sup> Maziarz stated he did not recall saying (sarcastically) to Simms "having a nice day, Jerry?" or "how's Jerry today?"

shop. In fact, Maziarz said that De Vroy, in particular, when he came to his office several times a day with work, would converse about nonwork-related topics. Maziarz also admitted that he had on prior occasions talked to Tornberg, Herzberg, and Sopcak about the Union in their shared office area during working hours. Maziarz stated that in protest, he, Tornberg, and Herzberg refused to sign the writeup.

Herzberg and Tornberg, with minor variance, corroborated Maziarz' version of the events leading to their receiving the written disciplines on August 4, 2000, as well as the Respondent's general allowance of talking about nonwork-related matters during work hours.<sup>106</sup>

Simms stated that on the day in question before the lunchbreak, as he was walking into the job processing area of the plant, he overheard an "overabundance" of laughter and wondered what was going on.<sup>107</sup> According to Simms, Tornberg, and Herzberg have very distinctive laughs and he heard them both laughing at a story Maziarz was telling about an inebriated person at a party store—or pharmacy. When he walked in on the men, Simms stated that Tornberg was pushed back from his desk facing Maziarz and, on seeing him, Tornberg immediately turned back around to his desk. Herzberg, according to Simms, appeared to be the only one of the three in a position to be working although he was not actually working at anything Simms could see. Simms said that Maziarz did not immediately see him and continued giving the interpretation of the drunken person's behavior. According to Simms, Maziarz evidently seeing the reaction of Tornberg and Herzberg—suddenly not laughing and resuming work—turned to Simms. Simms said he asked if Maziarz was working hard. Maziarz replied that he was.

Simms said that he then left the area and found the three workers' supervisor, De Vroy, and apprised him of what he had observed. According to Simms, De Vroy reminded him that he (Simms) had warned the men several times about talking and being boisterous, and setting a bad example for the other employees in the plant since they were kind of looked up to by the workers.<sup>108</sup> According to Simms, he said to De Vroy that perhaps it would be advisable to give them a written warning, which he did.

The General Counsel argues essentially that the discipline of the three was motivated by the Respondent's hostility to the Union and especially to those employees like Tornberg and Herzberg, who not only supported the Union but wanted to

serve in official capacities with it, and Maziarz, who was openly supportive of the Union.

The Respondent argues that the written discipline was justified because the three had been warned verbally before.

I would conclude that the Respondent violated the Act in giving Maziarz, Tornberg, and Herzberg written disciplines on August 4, 2000. First, there again is little doubt that the Respondent harbored animus against the Union and its supporters. Herzberg ran for a bargaining committee position and clearly was a union supporter. While direct evidence of his union involvement is not established, in my view, given the Respondent's record of surveilling unionists, I infer that the Respondent knew he was a union supporter.<sup>109</sup> As to Tornberg and Maziarz, the record supports a finding that the Respondent knew of their support of or involvement with the Union.

Second, I have credited Maziarz' (and Tornberg's and Herzberg's) version of the incident as well as their testimony regarding the evident common practice of their and their supervisors—De Vroy, Simms, and May—conversing about nonwork-related topics during work hours. I also have credited Maziarz' testimony that he reported Sopcak's worktime distribution of the antiunion fliers to management and, evidently, no discipline was imposed on him.<sup>110</sup> However, within an hour or so of Maziarz' complaint about Sopcak, Simms is in Maziarz' area and a discipline of the three ensues. I view this as highly suspect and, again, smacks of the Respondent's tendency to surveil union supporters.

I have also considered Simms' testimony regarding the matter and did not find it persuasive. First, Simms' conversation with De Vroy was not corroborated—De Vroy did not testify. Second, I found it somewhat incredible that Simms would have to be reminded by De Vroy that he (Simms) had previously verbally reprimanded the three for similar conduct. On balance, I believe that the behavior for which the three were written up was minor and insignificant, lasting only for perhaps a minute or less, and was not dissimilar to other nonwork-related conversation of other employees generally in the shop. Moreover, a more serious—in the Respondent's scheme—and contemporaneous distribution of literature during work hours by a known person (who happened to be antiunion) was not acted on by the Respondent. It is clear to me on this record that the three were discriminatorily disciplined because of their union support and involvement. I would find a violation of Section 8(a)(3) as charged in the complaint.

<sup>106</sup> For example, Herzberg and Tornberg remembered different time frames for the event; Tornberg said that De Vroy did not merely mumble something when he made his comment about the matter, he said, "this is f—ked," expressing disgust with the incident. Herzberg recalls that Maziarz said after Simms confronted them, "So, how is Jerry today;" Simms said, "just fine" and walked out, and then proceeded to speak to De Vroy. There were other minor variances, but none meaningful enough to make a difference in my view. I note that neither Tornberg nor Herzberg addressed Sopcak's distribution of the antiunion flier.

<sup>107</sup> Simms utilized a diagram of the processing office area in the plant to explain how he came to overhear the workers.

<sup>108</sup> De Vroy did not testify at the hearing; no reason was given by the Respondent for his nonattendance at the hearing.

<sup>109</sup> I note that the Respondent does not argue that it did not know of Herzberg's union activities.

<sup>110</sup> Kennedy identified the same flier that was circulating around late July 2000. Kennedy said he saw the flier in the shop area, on the refrigerator in the assembly department, by the bathrooms, on the walls in shipping areas, and near the bathroom in the weld area. He also stated he reported this to Binder who did not offer to take them down. The Respondent adduced no evidence regarding its handling Maziarz' complaint about Sopcak's distribution of this flier. I presume Sopcak was not disciplined.

3. The July 13, 2000, and January 11, 2001,<sup>111</sup> evaluations of Ronald Martin by Romanelli

[The July 13, 2000 evaluation session has been previously discussed earlier herein in some detail. Notably, I concluded that the Respondent, through Romanelli, has violated Section 8(a)(1) of the Act in the course of this evaluation.]

Martin stated that in the July 13 evaluation session, he told Romanelli that the 9-cents raise was a slap in the face. According to Martin, Romanelli agreed with him and said that he hoped that he (Martin) would not quit, that Romanelli valued him as an employee. Martin stated that Romanelli also stated that this evaluation was a “great” evaluation and he ought to be happy with the 9-cents raise.

Turning to the January 2001 evaluation, Martin said that Romanelli told him he had a bad attitude toward the Company and his job. Martin said that Romanelli told him that his work was not fast enough in the new department to which he had been assigned. Martin said he expressed his disagreement with Romanelli’s assessment. According to Martin, Romanelli in response said he was faster than some of the other welders. Martin said he was perplexed by Romanelli’s seemingly contradictory comments and asked him where he was coming from. Martin stated that his confusion in part stemmed from the comments on the form that he was talking excessively; this was a first. Romanelli told him that he (Martin) had a problem of talking in his area.<sup>112</sup> Romanelli also stated that it seemed to him that Martin’s performance dropped dramatically, contemporaneous with his wearing union buttons and shirts. Martin said he disagreed with the evaluation and wrote at the end in the comments section of the form that he felt the evaluation was based on his open support of the Union, not his abilities.

Romanelli stated that with respect to Martin’s July 2000 evaluation, he said nothing to him other than that it was satisfactory. According to Romanelli, Martin said the 9-cents raise was a slap in the face. However, Romanelli said that he disagreed with that remark. [As noted previously, Romanelli stated the Union did not come up in this evaluation.]

Directing himself to the January 2001 evaluation, Romanelli stated he informed Martin that improvement was needed; however, he (Romanelli) said that he made no reference to or mention of the Union.<sup>113</sup> According to Romanelli, Martin brought up the Union in this session and told him that he wanted Romanelli to know that he (Martin) was not with the Union. Romanelli said he responded by telling Martin that his involve-

ment with the Union made no difference to him. Romanelli acknowledged that Martin disagreed with the evaluation and refused to sign it. Accordingly, he asked another supervisor, Lynn Harrington, to sign as a witness to the presentation of the evaluation to Martin.<sup>114</sup>

The General Counsel argues that Martin, at the time of the July 13 evaluation, was the unknowing victim of the Respondent’s unlawful surveillance; and the 9-cents raise, the lowest raise Martin had received to that point in his career, reflected the Respondent’s hostility to his association with known unionists. He further argues that the next evaluation in January 2001 was essentially a continuation of that hostility; Romanelli’s negative attitude comments were merely a cover designed to give an even lower evaluation and, in fact, a more reduced wage increase (as compared with the amount then available).<sup>115</sup>

The Respondent essentially argues that Martin received a favorable evaluation on July 13 along with the maximum wage increase then available. However, in January 2001, by which time the Respondent had moved Martin to a production role in welding, it contends that Martin was simply not as fast in this assignment. Yet and still, because he was considered by Romanelli to be a good worker, he was given a 9-cents raise. The Respondent contends that there was no antiunion sentiment in the decision by Romanelli to give him this raise in January 2001.

In resolving these charges, I have considered Martin’s evaluations for periods prior to the ones in question. In each prior period, Martin received a raise based on some available amount.<sup>116</sup> Thus, the Respondent’s methodology or formula for granting wage increases has been in place for some time, certainly years before the advent of the Union. Also, in spite of having the opportunity to question witnesses who may have known about the wage increase formula, to wit, May and Simms, the General Counsel did not adduce evidence on this point. Contrary to the General Counsel, I cannot conclude that the Respondent’s wage increase formula is suspect or some device to reward antiunion sentiments and punish union supporters.

Turning to the July 2000 evaluation, it appears, thus, that Martin received all that he was entitled to by way of a wage increase. Also, as compared to his other evaluations by category, the evaluation was comparable in practically all evaluation areas—basically “meeting expectations.” Martin did not

<sup>111</sup> Martin’s evaluations are contained in GC Exh. 43 and cover the period December 20, 1995, through July 26, 2001. Martin received a 9-cents raise on July 13, 2000; this was the maximum available to him according to the form.

<sup>112</sup> Martin acknowledged that he knew that employees were allowed to talk about work-related matters during worktime, but not about non-work-related topics. He admitted that he was written up for excessively talking about 2 months before the hearing, but not before the July 2000 and January 2001 evaluations.

<sup>113</sup> As noted earlier, Martin said he made no secret of his support for the Union, including wearing union buttons on his hat in Romanelli’s presence every day after the election. However, Martin admitted that the Union was not specifically discussed in the evaluation session by either Romanelli or himself.

<sup>114</sup> Martin claims that he asked Harrington to witness the evaluation so that he could get a copy of it; he felt the Company would destroy it because of his comments about the connection of the evaluation with his support for the Union.

<sup>115</sup> The General Counsel submits that the Respondent did not disclose its formula for determining the “available” pay increases and how performance relates to raises. He argues that the Respondent’s witnesses who said simply the “computer figures it out” was a device to reward antiunion workers and punish union supporters.

<sup>116</sup> The Respondent, it appears, initiated placing the available wage amount on the form around July 1999. Before that, it appears that the Respondent indicated that the wage increase Martin received was based on a percentage of the available amount; for example, on December 19, 1997, Martin received 100 percent of the amount of raise available—50 cents.

complain about those preceding evaluations. The July 2000 evaluation was, as I have noted, accompanied by Romanelli's unlawful statements about the persons with whom Martin was seen associating. However, contrary to the complaint allegations and in spite of these comments, Martin, as I view the matter, did not receive an adverse impact on his opportunity for a pay raise in July 2000. I would recommend dismissal of this aspect of the complaint.

As to the January 11, 2001 performance evaluation, the picture of Martin's performance changed dramatically; he received, in 6 of the 11 performance categories, grades indicating he was performing below expectations. Also, for the first time, the Respondent (Romanelli) was moved to make negative comments about him, including his attitude and excessive talking. Contrary to the Respondent's assertion in its brief, Romanelli, in my view, did not grade Martin on the basis of his not adjusting well to the new order of business in the welding department, being too slow and what not. I believe this defense is pretextual. Moreover, as I have set out previously herein, the Respondent's hostility to the Union burgeoned in the months after the election. I cannot believe it simply a matter of coincidence that Martin's January 2001 evaluation (which covered this immediate postelection period) happened to be his first poor evaluation, especially since Romanelli, in the previous period, made the remarks about Martin's associations with unionists. It is clear to me that Martin's support for the Union impacted adversely his opportunity to receive a higher pay increase in January 2001, and I would find a violation of the Act in regard to this part of the complaint.<sup>117</sup>

4. The September (August 31) 2000 performance evaluation of Derek Dukarski by Binder

It may be recalled that Dukarski's August 31, 2000 performance evaluation was discussed earlier in this decision in the context of an alleged violation of Section 8(a)(1) of the Act. I would find and conclude that based on my findings of a violation of Section 8(a)(1) of the Act by Binder, who, in my view, tied Dukarski's evaluation and associated wage increase to his wearing of a union T-shirt, that the Respondent also violated Section 8(a)(3) of the Act in rendering this evaluation.

Because the complaint allegations are couched in terms of lost opportunity to get what amounts to a greater increase than Dukarski actually received as a result of the tainted evaluation, I recommend that the quantification of the loss be determined at the compliance stage of these proceedings.

5. The September 28, 2000, performance evaluation of Steve Coughran by Romanelli

Coughran stated that Romanelli evaluated his performance in September 2000 pursuant to his usual procedure of first discussing privately the performance elements verbally with him and then giving him the form for his signature. Coughran

stated that his evaluation for the 6-month period preceding the September 28, 2000 evaluation session was to him simply nonsense because, for the first time, he had been marked down to below expectations in six performance areas and rated unacceptable in another (attitude).<sup>118</sup> Coughran stated that he could have received a 26-cents raise but, in fact, initially received a negative 4-cents raise, which Romanelli did not implement.<sup>119</sup> Coughran said he did not discuss this evaluation with Romanelli at the time because he and other workers thought that the Respondent was being very cooperative with the Union and the general thought was that there would soon be a contract; Coughran felt Romanelli was simply writing anything he could on the employees for bargaining leverage. Coughran said he had never received a recommendation for a negative increase.<sup>120</sup>

The General Counsel contends that Coughran was simply another union supporter the Respondent chose to punish by way of the performance evaluation. Once more, as with Dukarski, he asserts that Coughran's negative attitude was instrumental in his being downgraded to the point that he initially was deemed only worthy of a pay decrease, a first for Coughran.

The Respondent counters, arguing that the *probable* reason for Coughran's recommended decrease was Coughran's unacceptable grade in attitude, as well as the below-expectations grades in six other performance areas, combined with his loss of 20 hours due to missed days and 6-1/2 hours lost to lateness or leaving work early. The Respondent submits that Coughran's immediately prior evaluation (April 12, 2000) establishes that when he got better grades in every area and had less hours lost time because of missed days and only 1/2 hour was lost by lateness or leaving early, he received the full amount of the available wage increase. The Respondent further submits that Romanelli intervened to override the computer and allowed Coughran's wage rate to remain the same, demonstrating his lack of animus against Coughran for his support of the Union. The Respondent also submits that when Coughran improved his work performance in the evaluation period after the September 28, 2000 evaluation, that is the April 19, 2001 evaluation, he again received the entire available wage increase.<sup>121</sup>

Contrary to the Respondent, I would find and conclude based on the credible testimony of Coughran that Romanelli harbored animus against the Union and Romanelli knew that Coughran

<sup>117</sup> I note in passing I found Romanelli's claim that Martin disavowed any support of the Union in January 2001, completely incredible. Martin seemed to be an unwavering supporter of the Union on this record. By reason of this fabricated testimony and other reasons stated herein, I believe that Romanelli evaluated Martin with animus against the Union and its supporters firmly in mind.

<sup>118</sup> Coughran's performance evaluations are contained in GC Exh. 23. The evaluation covers his employment with the Company from April 4, 1996, through October 9, 2001. Coughran's last evaluation was not discussed with him because of his callup for military service. He was scheduled to receive a 7-cents raise as a result of this last evaluation.

<sup>119</sup> All of Coughran's preelection performance evaluations, it should be noted, indicate that he was rated meeting expectations in all areas and he received from the Respondent's raises based thereon anywhere from around 80 percent—100 percent of the available raise.

<sup>120</sup> Coughran's evaluation includes a notation by Romanelli that his wage rate would remain the same, instead of the recommended negative 4 cents.

<sup>121</sup> The Respondent also points out that Coughran received the entire available amount for his last evaluation—October 9, 2001—because, in its view, he improved his performance.

was an outspoken union supporter. I note in this regard that Coughran testified that, in the first meeting convened by Romanelli after the election, he (Coughran) brought up the Union and told Romanelli he was “pretty much” for the Union, that the Union was going to get in here because the way things are going [at the plant] it is not very good. (Tr. 82.) Coughran said that he made this statement because of Romanelli’s statement that the Company did not want the Union. In my view, it is clear that Coughran’s “attitude” problems emanated from those spoken sentiments.<sup>122</sup>

I have considered the Respondent’s defense and, in all candor, find it unpersuasive. First, if his prior evaluations offer any insight, Coughran evidently had no attitude problems prior to the September 28, 2000 evaluation, which covered the period after the election. Second, Romanelli did not, in my view, adequately explain his evaluation of Coughran except to say Coughran had a negative attitude, did not communicate very well, and may have had some domestic problems causing his performance to suffer between April 5, 2000, and September 28, 2000. This does not adequately explain Coughran’s dramatic downgrade.

In my view, Romanelli’s reasons do not hold water. Coughran clearly was regarded by the Respondent as a good worker and prior to September 28, 2000, received very good evaluations. I note that he received his full wage increases in several evaluations in spite of having missed hours comparable to those missed for the September 28, 2000 period. In fact, in the April 19, 2001 evaluation, he lost 31-1/2 hours—more than ever before—because of missed days and yet received the full amount available. It seems Coughran’s fortunes suffered only under Romanelli’s supervision and, to be sure, Romanelli did not approve of the Union. On balance, I would find and conclude that the Respondent violated the Act by discriminatorily evaluating Coughran because of his support of the Union and, as a consequence, adversely impacted his opportunity for a pay increase on September 28, 2000.

#### 6. The October 3, 2000 performance evaluation of Scott Cronkright by Romanelli

Cronkright testified that he worked for the Respondent for about 4 years as a welder and forklift truckdriver assigned to the first shift at the time of hearing. Cronkright said he was no longer employed by the Company, having been let go on about May 8, 2001, for failing to report for work without a call-in (no show, no call).

Cronkright stated that beginning in late 1999 and certainly by calendar year 2000, his immediate supervisor was Romanelli, who gave him his performance evaluations.<sup>123</sup>

Turning to his October 3, 2000 evaluation, Cronkright stated that he told Romanelli that he felt that the remarks about his bad attitude were unjustified; he, however, admitted to Romanelli that his attendance was bad. According to Cronkright,

<sup>122</sup> Prior to September 21, Coughran received meeting-expectations grades in all of his performance evaluations.

<sup>123</sup> Cronkright’s performance evaluations are contained in GC Exh. 41. Cronkright was supervised by Steve Drake from at least December 10, 1997, through the evaluation period covering September 27, 1999, after which time Romanelli undertook his evaluations.

Romanelli said he had no control over the matter (evaluation), it was Simms’ decision. Cronkright said that he and Romanelli talked about favoritism at the plant and in the course of this discussion, Romanelli said he respected Cronkright for showing support for the Union and not hiding his support like some other employees. Cronkright said Romanelli agreed with him regarding the existence of favoritism at the plant, which led Cronkright to ask why he did not get a raise.<sup>124</sup> According to Cronkright, Romanelli said that although he tried to get Cronkright a raise mainly because he had shown some improvement, he (Romanelli) had no control over the raise issue. Cronkright stated that he told Romanelli that the negative raise (loss) of 43 cents he was to receive was a first for him, and told Romanelli that he felt that his support for the Union was the real reason.<sup>125</sup>

Romanelli stated that in evaluating Cronkright for October 2000, that he generally performed below expectations (a “1”); Cronkright’s major problem was excessive talking, as well as interfering with others in the performance of their duties (“his biggest problem”) during working time. Romanelli also noted that Cronkright’s attendance was an issue and, in fact, he later lost his job because of poor attendance.

The General Counsel essentially contends that, like the other union adherents at the company, Cronkright’s “negative attitude” and hence his poor evaluation were based on his open support for the Union. The Respondent argues that Cronkright’s severe attendance problem was the reason he was given a poor evaluation and this attendance problem ultimately led to his being discharged by the Respondent.<sup>126</sup>

It appears that around the time the Respondent was evaluating Cronkright, it was not pleased with him and wanted to get rid of him.<sup>127</sup> It is also fairly well established on this record (there being no serious contrary argument from the Respondent) that Cronkright’s support of the Union after the election was open and enthusiastic, as evidenced by his daily wearing of union pins, hats, and shirts. Moreover, in the course of his evaluations, Cronkright credibly testified that Romanelli

<sup>124</sup> Cronkright’s October 3, 2000 performance evaluation indicates that he was going to receive a 43-cents per hour reduction in his wages. Romanelli, however, changed this and allowed his current wage to remain in place.

<sup>125</sup> Cronkright testified that he began wearing his buttons proclaiming “Proud to be Union” and “Support your Union,” and union T-shirts at work immediately after the election and wore them daily. Also, Cronkright said he spoke to supervisors Binder, Simms, and May while wearing these union items. Cronkright, who evidently wore or displayed these items while working for Romanelli, stated he never argued with Romanelli and got along with him fairly well. Cronkright specifically stated that Romanelli never bothered him or said anything to him about the Union and never hassled him about the buttons. Cronkright said that he, however, did see supervisors hassling Martin about his wearing union buttons and shirts.

<sup>126</sup> Cronkright’s discharge on May 8, 2001, is not the subject of the instant complaint.

<sup>127</sup> This point is amply established by the credible testimony of Michael Leach, who stated that he overheard Binder and May around September 1, 2000, talking about the Union. According to Leach, May, while observing Cronkright operate the forklift, said as soon as they could find a reason, the Company was going to get rid of him. (Tr. 747.)

praised him for his courage in openly supporting the Union, not hiding it as others were.

So, on its face, the General Counsel, in my view, established discriminatory conduct by the Respondent in evaluating Cronkright on October 3, 2000.<sup>128</sup> However, I believe that the Respondent has persuasively demonstrated that Cronkright's work record for the period for which he was evaluated justified the rating he received on that date. Towards that conclusion, I examined Cronkright's evaluations prior to October 3, 2000, and it is clear that his attendance problems had previously cost him raises. For instance, in his March 8, 2000 evaluation, Cronkright received only 19 cents of 50 cents available to him. During the period covered by this evaluation, Cronkright lost 30 hours due to missed days, 6 hours lost by lateness or leaving early, although some improvement was noted from his prior evaluation. That prior evaluation—September 27, 1999—shows that Cronkright missed 90 hours due to missed days, 11.75 hours for lateness, and 10.50 hours lost by discipline; he received a raise of only 18 cents of 50 cents available. The evaluation prior to this one—March 30, 1999—shows 67.75 hours lost due to missed days and 4.50 hours lost due to lateness; the previous one to this—September 22, 1998—shows 70 hours lost to missed days; and the evaluation for March 10, 1998, shows 40 hours lost due to missed days and 3.75 hours for lateness. In each of these latter three evaluations, Cronkright did receive a small raise but the forms do not indicate what amount was available to him. I would note that for these evaluations, Cronkright received good evaluations in the other performance categories; essentially, he met expectations in all categories. I note also that as Cronkright's attendance problems worsened, his performance in other areas also dipped.

By October 3, 2000, Cronkright had lost 72 hours due to missed days, 3.75 hours due to lateness, and 9.25 hours because of discipline and he received in every performance category a rating of below expectations and would have received a loss of 43 cents per hour. However, Romanelli interceded and kept him at his current wage rate. Given Cronkright's history and the generally recognized importance of good attendance for purposes of job retention and advancement in the United States, it seems that Romanelli may have in the vernacular, cut Cronkright a break. Said another way, I do not see in the context of Cronkright's work history that his performance evaluation for the period in question was adversely impacted in spite of the Respondent's antipathy to the Union and its supporters like Cronkright. I would recommend dismissal of this aspect of the complaint.<sup>129</sup>

<sup>128</sup> I have previously determined that Romanelli harbored animus against the Union and its supporters, and his making the statement praising Cronkright for courageously and openly supporting the Union in this particular instance provides grounds for determining, *prima facie*, that Cronkright's support of the Union was a motivating (in whole or in part) factor in his performance evaluation.

<sup>129</sup> I note in passing that Cronkright received the full amount of available increase only on one occasion, December 10, 1997, when he started with the Company. His attendance problems thereafter evidently became chronic.

#### *D. The 8(a)(5) Allegations*

##### *1. The Respondent's withdrawal of recognition of the Union on June 18, 2001*

The complaint alleges (and the Respondent does not dispute) that by letter<sup>130</sup> dated June 18, 2000, the Respondent withdrew recognition from the Union based on several petitions and individually signed cards representing 154 of 223 bargaining unit employees indicating that they no longer desired the Union to represent them at the Company. Based on these, the Respondent notified the Union that, henceforth, it would discontinue engaging in collective-bargaining negotiations with it until further notice.

The General Counsel essentially argues that the withdrawal was violative of Section 8(a)(5) of the Act in two distinct ways. First, the signatures supporting the decertification were solicited during the Union's certification year and, second, the signatures were tainted by the apparent support of the Respondent during their collection and the existence of unremedied unfair labor practices, all of which impermissibly undermined the Union.

The Respondent principally argues that it had no knowledge that decertification petition signatures were being gathered on June 13 and 14, 2001, dates it concedes were within the certification year. The Respondent also contends that any unfair labor practices it may have committed during the certification year were relatively minor and affected only a few of its 200 plus employees. The Respondent goes so far as to contend that even if it were found culpable for all of the 8(a)(1) and (3) related unfair labor practices as charged in the complaint, of the 200 plus employees, 100 would not have known about the violations as to affect their desire to support or not support the Union.<sup>131</sup>

##### *Legal Principles Applicable to the Withdrawal Issue*

Under Section 8(d) of the Act, an employer and the representative of its employees must bargain collectively; that is, the Act requires both parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees.

Collective bargaining makes a union the exclusive representative of the employees. Toward that end, Section 9 of the Act provides that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a union unit appropriate for such purposes shall be

<sup>130</sup> This letter is contained in GC Exh. 6. The letter drafted by the Respondent's legal representative, Robert Kendrick, was addressed to the Union's staff representative. It should be noted that GC Exh. 6 includes copies of the individual decertification cards and petitions cited by the Respondent in the letter and cover the dates June 13, 14, and 15, 2001, as well as a letter from Kendrick dated June 27, 2001, to Richard Yorke of the Board's Region 7 office in Detroit, informing him of the decertification.

<sup>131</sup> The Respondent does not explain in its brief how it arrived at this conclusion.

the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

By long established precedent, there is an un rebuttable presumption of representation for the first year. *Brooks v. NLRB*, 348 U.S. 96 (1954). Said another way, a union enjoys an un rebuttable presumption of continuing majority status for 1 year after its certification; thereafter, the presumption is rebuttable. Therefore, an employer may not refuse to bargain during the 12-month period even though the employer is confident that the union has lost majority support. *NLRB v. Lee Office Equipment*, 572 F.2d 704 (9th Cir. 1978). The application of this rule even extends to situations where there is evidence that employees abandoned their certified union and allegations of union misconduct. *NLRB v. Burns Security Service*, 406 U.S. 272, 279 fn. 3 (1972); *Inter-Polymer Industries v. NLRB*, 480 F.2d 631, 633 (9th Cir. 1973); and *NLRB v. Holly-General Co.*, 305 F.2d 670, 674 (9th Cir. 1962). In short, during the certification year, the employer is absolutely obligated to negotiate in good faith with the properly elected or designated collective-bargaining representative of its employees.

Notably, *Brooks* recognizes that unusual circumstances may alter the irrebuttable presumption of majority status—defunctness of the certified union, a schism within the certified union and radical fluctuation in the size of the bargaining unit. *Id.* at 98.<sup>132</sup>

Moreover, the Board has recently held that an employer does not have the right, after expiration of the certification year, to withdraw recognition from the Union on the basis of an anti-union petition circulated and presented to the employees during the certification year. *Chelsea Industries*, 331 NLRB 1648 (2000).

The Board has long held that (irrespective of the *Brooks* rule) an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected with the Union. *Olson Bodies, Inc.*, 206 NLRB 779, 780 (1973). The Federal courts more recently have endorsed the principle holding that employers may not destroy a union's majority status through unfair labor practices and then justify its refusal to bargain on the basis of the union's lack of majority support.<sup>133</sup> Generally, then, a company may not avoid the duty to bargain by a loss of majority status caused by its own unfair labor practices.<sup>134</sup>

The unfair labor practices, however, must be of a character as to either affect the union's status, cause employees' disaffection or improperly affect the bargaining relationship itself. In

short, the unfair labor practices must have a causal relationship with the employees' disaffection with the Union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

*Olson Bodies*, supra, speaks to several factors useful for determining whether such a causal relationship exists including (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on the employees' morale, their organizational activities, and membership in the Union.

Finally, withdrawal of recognition may be accomplished, but generally only if the employer can affirmatively establish after the 1-year certification period has passed either (1) that the union no longer enjoyed majority status when recognition was withdrawn, or (2) that the employer's refusal to bargain was predicated on a reasonably grounded doubts as to the union's continued majority status, which doubt was asserted in good faith, based upon objective considerations and raised in a context free of employer unfair labor practices. *NLRB v. Windham Memorial Hospital*, 577 F.2d 805 (2d Cir. 1978); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975); *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973); and *Harpeth Steel, Inc.*, 208 NLRB 545 (1974).

#### Discussion and Conclusions

I would find and conclude, contrary to the Respondent, that certain of its antiunion employees were engaged in soliciting signatures from unit employees in the company parking lot on June 13 and 14, 2001. I will also find that based on its own interpretation of its no-solicitation policy in force at that time, the Respondent discriminatorily allowed the antiunion employees to solicit the signatures on company property. Accordingly, based on this conduct, the Respondent, in my view, in effect lent its support to if not encouragement of the decertification effort within the certification year in violation of Section 8(a)(5) of the Act.

It may be recalled that Henk and other supervisors prohibited union committeemen from distributing union meeting notices in August 2000 based on the Company's no-solicitation rule. Henk, of course, was present in the parking lot on the days the antiunion employees were engaged in what most clearly was a solicitation effort on June 13 and 14. Yet, on these occasions, Henk claims ignorance of what was going on and, while feeling uncomfortable, he did not, even out of normal curiosity, investigate the activities going on before his very eyes. I find his denials not credible. I believe that just as Stack and Dukarski were able to determine that Sopcak, Drake, and the other unidentified man were soliciting signatures to decertify the Union, Henk, in likewise, knew what the men were up to and purposely did nothing to intercede because the decertification was in keeping with the Respondent's desires and plans to rid itself to the Union. I find it difficult to believe that Henk did not inform his supervisors of this activity. Thus, knowingly and intentionally, not enforcing the no-solicitation rule in force at the time, the Respondent, in my view aided and abetted an improper (and unlawful) decertification of the Union through its

<sup>132</sup> See also *NLRB v. Lexington Cartage Co.*, 713 F.2d 190 (6th Cir. 1983), where the court, following the *Brooks*' rule, noted there were no "unusual circumstances" preventing application of the rule.

<sup>133</sup> *People's Gas System, v. NLRB*, 629 F.2d 35, 38 (D.C. Cir 1980). See also *NLRB v. Nu Southern Dyeing & Finishing*, 444 F.2d 11, 16 (4th Cir. 1971), holding an employer is precluded from asserting a good-faith doubt if its unfair labor practices significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based.

<sup>134</sup> *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).

cooperating employees, like Sopcak, during the certification year.<sup>135</sup> For these reasons, I do not accept May's on-record denial of knowledge of the decertification effort until two employees (Sopcak and Drake no less) presented the petition to him as a fait accompli. It is clear from the record that surveillance of the employees' union activities was not out of bounds for the employer. It is highly unlikely, in my view, that the Respondent (May in particular) did not know of the sentiments and the activities of these self-same employees who opposed the Union and were acting consistent with that stance in full view on company property on June 13 and 14. Accordingly, I would conclude that the Respondent did not accept the decertification petitions and cards in the good-faith belief that they had been obtained after the 1-year certification period. In my view, the Respondent knew they had been obtained about June 13 and 14 (and possibly 15), within the certification year. Thus, in my view, the Respondent did not have a good-faith doubt of the Union's loss of majority status and was not justified in withdrawing recognition of the Union.

Regarding the existence of unremedied unfair labor practices, little need be said. I have previously found numerous instances of unfair labor practices on the Respondent's part after the election. The question is whether these violations caused or could be said to have caused the loss of majority support of the Union.

I would conclude that the unfair labor practices, within the meaning of causation as circumscribed by my reading of Board authority, were causal in the loss of majority status of the Union. As noted, the clear objective of the Respondent almost immediately after the election was to oust it. This plan, in my view, was formed and implemented at the top of management's hierarchy (May) and percolated through to lower managers such as Henk and included the harassment of key union supporter such as Kennedy, Leach, Tornberg, and Herzberg, and even ordinary supporters of the Union such as Coughran, Stack, and Dukarski to name a few. So, although only a relative few of the Respondent's bargaining unit employees were directly affected by the unfair labor practices, they were specifically targeted, in my view, by the Respondent in order to effectuate the ouster of the Union. Along those lines, for example, the Respondent allowed the distribution of antiunion literature, not union materials; union posters were ordered down but not other nonwork-related items; union solicitors were considered trespassers but not those opposed to the Union; wage raises or opportunities therefore were diminished because of union support; union supporters conversing about trivial nonwork-related matters were punished rather severely. This list goes on. In sum, the Respondent sought to rid itself to the Union from the election on, and the unfair labor practices, in my view, were by design calculated to undermine the Union's influence at the plant and cause the bargaining unit employees to lose confidence in the Union's ability to represent them. Coupled with the Respondent's violation of the 1-year certification rule, I

<sup>135</sup> Contrary to the complaint, I do not believe Henk's presence at the scene was itself coercive because it seems clear he did nothing of an overt nature to aid the decertification effort. I will dismiss this aspect of the complaint.

would conclude that it also violated Section 8(a)(5) of the Act by withdrawing recognition of the Union and refusing to engage in collective bargaining in spite of the existence of unremedied unfair labor practices.

## 2. The June 19, 2001, wage increase

The complaint (in par. 16) alleges that on or about June 19, 2001, the Respondent granted a wage increase to unit employees, increased the starting rate for new unit employees, and revised its merit evaluation system for unit employees.

In its answer, the Respondent admitted that on June 19, 2001, by letter, it granted a wage increase to current and new unit employees; and, further, that the Company's merit evaluation system was revised to make merit increases retroactive to the employees' 6-month anniversary date of hire.<sup>136</sup> The Respondent submits that these changes were based on the decertification petition and its subsequent withdrawal of recognition of the Union. Since the Respondent determined that the Union no longer represented its employees, the Respondent submits that it was free to make these changes unilaterally.

Wages, hours, and benefits are mandatory subjects of bargaining over which an employer must bargain with its employees' exclusive collective-bargaining representative before instituting any changes unilaterally. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).<sup>137</sup> The Respondent admits it did not engage in bargaining and justifies its actions on the strength of its withdrawal of recognition of the Union, conduct I have found unlawful. Accordingly, having unlawfully withdrawn recognition of the Union, the Respondent, in my view, correspondingly violated Section 8(a)(5) by granting the wage increases and revising its merit evaluation system as alleged on June 19, 2001, and I would so find.

## 3. The reduction of working hours and relocation of certain unit employees since January 2001

The complaint alleges that the Respondent, since about January 2001, reduced the working hours of and relocated certain employees.

The General Counsel contends that around January 2001, the Respondent transferred employees Scott Langhorne, Randy Weir, and other employees in the unit without providing the Union with advance notice or any opportunity to bargain over these moves.

The General Counsel called Langhorne<sup>138</sup> to testify about these charges.

Langhorne stated that prior to January 2, 2001, he was employed as a welder in the stainless steel section, assigned to the first shift; he had been in this assignment a little over 4 years.

<sup>136</sup> See GC Exh. 6. The June 19 letter was distributed to all Saginaw Control and Engineering, Inc. employees and was signed by May. The letter incorporates the proposed increases and revision of the merit evaluation system as alleged.

<sup>137</sup> The Respondent admits that the wage increases for current and new unit employees and any changes in its merit evaluation system relate to wages, hours, and other terms and conditions of employment of the covered unit of its employees and are mandatory subjects of collective bargaining.

<sup>138</sup> Langhorne has been employed with the Respondent for 9 years as a welder.

According to Langhorne, around January 2, Romanelli, his welding supervisor, convened a group of the welders, including Randy Weir,<sup>139</sup> Jim Merkle, Mike Posenelli (phonetic), and himself, and informed them he was going to make some changes in the department.<sup>140</sup> These changes included transferring Weir and him from the stainless section and reassigning them to the north weld line.<sup>141</sup> Langhorne also testified that in January 2001, he was working 50–56 hours per week; then, around the second week of February 2001, his hours were cut to about 40 hours per week. Thereafter, Langhorne said that around the 8-hour mark in each day, a supervisor would tell him to quit and go home. According to Langhorne, there were about 12 employees on the north weld line and, although he was told that there was not enough work beyond 8 hours for Weir, two (unidentified) other workers, Pat Chubb and James Brabau, and himself, Langhorne observed that other workers were still allowed to remain on shift. On occasion when he was sent home, Langhorne said he saw piles of metal that needed to be worked on. According to Langhorne, he complained to May about his hours when they dipped below 40 hours. May told him that business was slow but he did not want any worker receiving less than 40 hours and would speak to Simms about the matter.

Langhorne stated that towards mid to late May 2001, he was cut to 24 hours and this lasted until about the end of June 2001, at which time his hours were increased and he received 56 hours one week during this time.<sup>142</sup> Langhorne noted that the increases in his hours started right after the decertification petition was filed. Langhorne also stated that around this time, the Company's monthly newsletter—"The Fabricator"—announced that the Union had been ousted, that the employees were going to receive a 3-percent wage, and work hours were going back to normal.

Langhorne also stated that over the time his hours gradually began to increase, he was merely told to stay beyond the usual 8 hours; Langhorne also said he would ask management whether he should report to work the next day. After about a week of this, he merely assumed he should come back to work and did so.

Langhorne says that, currently, he is working back in stainless but now assigned to the second shift.

<sup>139</sup> Weir did not testify at the hearing, nor did any other employees allegedly affected by the reduction in hours and reassignments.

<sup>140</sup> Langhorne said that Weir and Merkle were assigned to stainless and Posenelli was a coordinator there. Posenelli, according to Langhorne, was not transferred to the north line.

<sup>141</sup> Langhorne described his job in stainless as a higher quality skilled job that entailed working with individual stainless steel products at his bench. The north weld job was to Langhorne a demotion because it was essentially production line work usually assigned to new hires and workers with lesser technical welding skills.

<sup>142</sup> Langhorne said that when he was reduced to 24 hours, other workers were receiving as many as 50 hours, and certainly over 40. He stated that he knew this because when he punched out on these occasions, other workers continued to work the line. Also, he sometimes came to the plant on days he was not assigned hours and found that certain employees were working.

Robert Madden was also called by the General Counsel.

Madden stated that he is employed as a staff representative for the Union and in that capacity was responsible for negotiating initial contracts between employees represented by the Union and employers. Madden stated that he was the Union's lead negotiator on the bargaining team which attempted to negotiate a contract with the Respondent; he attended all negotiating sessions with the Company, answered questions from and handled various problems regarding the unit members at the plant.<sup>143</sup> According to Madden, the bargaining sessions started around June 24–26, 2000, and ended around June 12–19, 2001,<sup>144</sup> when the Company announced by letter that it would no longer engage in collective bargaining because of the decertification petition.

Madden stated that he knew Langhorne as one of the unit employees and that the Respondent never told him anything regarding his job, specifically that his job was being changed or he was being reassigned; in likewise, Madden stated that no company representative mentioned anything about Weir's job. Madden stated that as of the first quarter of 2001 (and thereafter), he could recall no bargaining with the Company about relocation, reassignments, or transfers of any unit employees at any time over the period negotiations were ongoing. Madden specifically denied that the Union ever agreed to any relocation, transfers, or reassignments of unit employees.

Madden acknowledged that during the period covering about February through June 12, 2001, there was a discussion in bargaining sessions regarding the Company's proposed change in the time of the lunch period. However, at no time did company representatives raise the issue of any proposed or actual changes of work hours of any individual unit employees, nor was there any mention of reduction of hours.<sup>145</sup>

The Respondent admits that it reduced working hours, but not because of the Union or the antiunion campaign, but because of economic reasons.<sup>146</sup>

The General Counsel submits that the Respondent's defense—its purchase of new equipment for the north weld line and business turnaround—is not relevant to the charge of failing to bargain in good faith. I would agree that the Respondent's defense misses the point. An employer must bargain over mandatory subjects such as the items covered by the charge before unilaterally, and without notice to the Union, imple-

<sup>143</sup> Madden stated that at the very first negotiating session with company officials, Fred May, Simms, its attorney, Robert Kendrick (Madden mistakenly referred to him as Kennedy), and Union Representatives Kennedy, Leach, and originally Tornberg and then Herzberg, he informed all that he was the lead negotiator for the Union.

<sup>144</sup> Madden said the last actual bargaining session was on June 12, 2001.

<sup>145</sup> Madden stated that the union committee members discussed reduction of hours among themselves but that this was not discussed in bargaining sessions with the company representatives present.

<sup>146</sup> See p. 51 of the Respondent's brief. Notably, the Respondent's discussion of this point, as set out in this section of its brief, does not address the transfer or reassignment of unit employees. The economic reasons cited by the Respondent are essentially those offered by Simms. These economic reasons were previously discussed fully in this decision and will not be repeated here.

menting changes. Clearly, based on the credible (and unrebutted) testimony of Madden and Langhorne, coupled with the Respondent's admissions, the Company, in my estimate, did in fact reduce hours of certain unit employees and also reassigned employees in the interest of achieving certain efficiencies and savings in its operations and perhaps because of performance problems of certain employees.<sup>147</sup> However, the Respondent did so without notice to the Union or without first offering to bargain over these mandatory subjects with the Union. I would find a violation of the Act in this conduct. *Eugene Iovine, Inc.*, 328 NLRB 294 (1999).

4. The Union's February 23, 2001 request for information

The complaint alleges, and there is no dispute, that the Union, through its legal counsel, Arlus S. Stephens, on February 23, 2001, requested by letter through the Respondent's legal counsel, Robert Kendrick, certain information from the Company,<sup>148</sup> as follows:

Re: Saginaw Control and Engineering  
Information Requests

Dear Mr. Kendrick:

As you requested, the Union has reduced its information requests to writing. Confirming what we requested on February 14, 2001, the Union requests the following information from the company:

- 1) A current, up-to-date seniority list for all bargaining-unit employees.
- 2) A current, up-to-date wage structure and list of the wage the Company currently pays to each bargaining-unit employee.
- 3) A list of every bargaining-unit employee who the company has decided to give a raise to (and in what amount) since June 1, 2000.
- 4) A list of all employees the company has disciplined, in whatever manner or degree, for the offense of "talking" or any similar offense, since January 1, 1996. Please provide supporting documentation as well.
- 5) A copy of any first-contract, collective bargaining agreements in the manufacturing sector, of which you are aware and to which you have access, that have a duration of less than two years.

We will await receipt of your written information requests and will respond as quickly as possible. We hope we can expect the same from the company.

<sup>147</sup> Romanelli stated that he relocated Langhorne and Weir to the north weld line around January 2001 because each had performance problems, which each man improved upon eventually with the result that Weir and Langhorne were returned to stainless. Romanelli did not address the reassignment of the other workers named by Langhorne. Romanelli, it may be recalled, also said he instituted a change in the welding department regarding the handling of parts to achieve some efficiencies and eliminate nonwork-related conversations. It seems there was no bargaining over this change in work procedure, but it is not the subject of a complaint allegation.

<sup>148</sup> The letter is attached as Exh. A to the complaint.

Please call with any questions or concerns.

Very truly yours,  
/s/  
Arlus J. Stephens  
Assistant General Counsel

Madden testified about the Union's request for this information. According to Madden, the Union originally made the request of Kendrick at a bargaining session on February 12, 2001. Kendrick asked that the request be reduced to writing; and the Union complied.

Madden explained his reasons for each of the categories of information listed in the letter. As to item 1's request for an up-to-date seniority list for all unit employees, Madden stated that he and the Union determined that the Respondent experienced a large turnover among its employees with a possible corresponding effect on the seniority status of the remaining unit employees. Basically, the Union wanted to know whom it was representing and where each employee stood in terms of plant seniority.

Regarding item 2, Madden noted that at the beginning of negotiations (in June 2000) with the Respondent, the starting rate for unit employees was \$6.96 per hour. The Company, in the Union's view, had arbitrarily increased the starting rate to \$7.10. Moreover, during negotiations, the Respondent granted merit increases for different employees at different rates and amounts. Some, according to Madden, however, received "negative" increases. Madden said that the Union needed to know what employees had received these adjustments since the Union arrived. However, the Union did not have a firm grip on the Company's wage structure so as to make an intelligent assessment of these adjustments and needed the requested information.

According to Madden, item 3 reflects the Union's concerns raised in bargaining sessions with the Company about its merit evaluation system. Madden said the Union repeatedly asked company representatives how the system worked, who received wage increases, and on what basis or criteria, but the answers provided by management representatives, in the Union's view, were unsatisfactory.

Madden stated that item 4 of the letter was based on complaints of a number of unit members who said they were being disciplined for talking because of union involvement. The Union wanted to assess whether these alleged disciplines for talking or any similar offense were valid.

Regarding item 5, Madden stated that in the first bargaining session, Kendrick told the Union that the Company was only interested in a 1-year collective bargaining contract. According to Madden, the Union's response was to question this because 1-year contracts are simply not the rule. Therefore, the Union requested that the Company supply copies of any initial contracts applicable to the manufacturing sector with a duration of less than 2 years that may be in the Company's possession.

Madden said that by letter on February 26, 2001, Kendrick responded to the Union's attorney. Kendrick acknowledged receipt of the Union's letter and asked for an explanation of the purpose of item 4, specifically whether it pertained to a current unfair labor practice charge, and the significance of the date of

January 1, 1998. Kendrick stated that based on the Union's response to this letter, the Company reserved the right to provide the item 4 information.<sup>149</sup>

Madden stated that on March 6, 2001, the union attorney responded by letter to Kendrick and explained the Union's need for the requested information covered by item 4 of the earlier letter as well as the purpose of using January 1, 1998.<sup>150</sup>

Madden stated that the Company provided a list of unit employees and their current wages to the Union at a bargaining session some time before May 2001 in response to item 1 of the Union's February 23 letter.<sup>151</sup> However, the Union did not consider the list responsive to the request because the list of employees was not a seniority list (with dates of hire) and, based on the personal knowledge of the Union's committee members, some of the listed workers' wages were not current.<sup>152</sup> Madden stated that the Union received no further response from the Company regarding the other requested items, but it still needs the information.

The Respondent argues first that regarding item 1 of the letter sent by the Union on February 23, 2001, the list it provided to Madden complied with the request for a seniority list and, moreover, that this information was provided in the early bargaining sessions. Second, the Respondent argues that the disciplinary information requested in item 4 of the Union's letter was an improper attempt to gather information to buttress an unfair labor practice charge and not to further the collective-bargaining process. The Respondent submits that it was not required to provide this information under these circumstances or for this purpose. It asserts that the request reflects bad faith on the Union's part.

Regarding the Union's request for sample contracts of less than 2 years' duration (item 5), the Respondent argues that since the Union refused to provide to the Company copies of union (Steelworkers) contracts, it is within its right to withhold these documents from the Union.<sup>153</sup>

The Respondent submits that it has complied with the request for the remaining items covered by the Union's letter, that is (presumably), the wage structure (item 2) and list of employees to whom the Company has given a raise since June 1, 2000 (item 3). On this point, the Respondent contends that Madden

was not even sure if he had received by June 20, 2001, the information from Stephens and cannot be relied upon on this issue.<sup>154</sup> On balance, the Respondent submits that the Union simply wanted updates of information the Company has previously supplied. Moreover, the Respondent contends that the Union had not bothered to read the information and index or cross-reference it to the information it had previously received.

#### Legal Principles Applicable to the Duty to Provide Information

An employer has a statutory obligation to provide a union, on request, with relevant information needed by the Union for the proper performance of its statutory duties as a collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

Information deemed relevant must also be provided timely by the employer in order to comply with the imposed obligation. *Amersig Graphics, Inc.*, 334 NLRB 880 (2001); and *Columbia University*, 298 NLRB 941 (1990). The duty arises as soon as the union becomes the employees' collective-bargaining representative and continues throughout the life of any agreement reached. *Sinclair Refining Co. v. NLRB*, 306 F.2d 569 (5th Cir. 1962).

The duty to provide information encompasses not only material necessary and relative for the purpose of contract negotiations but also information necessary for administration of a collective-bargaining agreement. *Howard University*, 290 NLRB 1006 (1988).

The Board has long considered data or information concerning the employees' wages, hours, and terms and conditions of employment presumptively relevant and, on request, must be provided to the collective-bargaining representative by the employer. *Whitin Machine Works*, 108 NLRB 1537 (1954), *enfd.* 217 F.2d 593 (4th Cir. 1954), *cert. denied* 349 U.S. 905 (1955).

As noted above, where the information sought by the union pertains to employees in the unit, the core of the employer-employee relationship, the information is deemed presumptively relevant and must be disclosed or provided to avoid violations of Section 8(a)(5) and (1) of the Act. However, where the information requested concerns matters outside the bargaining unit, the burden is on the union to demonstrate relevance. *Shoppers Food Warehouse*, 315 NLRB 258 (1994); *Reiss Vining*, 312 NLRB 622, 625 (1993). The union satisfies its burden when it demonstrates a reasonable belief supported by objective evidence for requesting the information. *Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988).<sup>155</sup>

<sup>149</sup> See GC Exh. 9. This letter makes no reference to the other items in the Union's February 23, 2000 letter requesting the information.

<sup>150</sup> This letter is contained in GC Exh. 8.

<sup>151</sup> This employer provided list of employees and wage rates is contained in GC Exh. 10. Madden stated that contrary to the notation on the document, this information was not provided on May 8, 2001, but some time prior to that date at one of the later bargaining sessions.

<sup>152</sup> Madden stated that at the February 14, 2000 bargaining session, the Union first orally made the request covered by item 1 to the Company; the Union sought a list of employees with seniority dates, addresses, job descriptions, and wage rates.

<sup>153</sup> The Union, on October 29, 2001, entered into a settlement agreement with the Acting Regional Director for Region 7 in which it agreed, among other things, to provide copies of collective-bargaining agreements requested pursuant to an information request of the Respondent and review other contracts pursuant to this request. The Respondent did not join in the agreement. See GC Exh. 11. The Respondent viewed the agreement as a "sweetheart deal" with the Union and the Region and objected to the proposed settlement.

<sup>154</sup> The Respondent notes that Stephens was not called by the General Counsel as a witness.

<sup>155</sup> The Board, by contrast, has also held that an information request that does not directly bear on or concern wages, hours, and terms and conditions of employment may not enjoy presumptive relevance, and the requestor must demonstrate a specific need for the data; a general claim of relevance will not be sufficient in such cases (see *F. A. Barlett Tree Expert Co.*, 316 NLRB 1312 (1995), where the union sought information contained in contracts of all the employer's customers and the Board determined that there was an insufficient relationship of the

The requesting union must have a good faith basis for the requested information. *W-L Molding Co.*, 272 NLRB 1239 (1984); there is a presumption of good faith unless the contrary is shown (especially where the information sought is presumptively relevant). *O & G Industries*, 269 NLRB 986, 987 (1984).

The employer has the burden of proving lack of relevance or providing adequate reasons why the information will not or cannot be supplied. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

The Board uses a broad, discovery-type standard in determining relevance in information request cases, including those where a special demonstration of relevance is obligatory; potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Reiss Viking*, supra; *Children's Hospital of San Francisco*, 312 NLRB 920, 930 (1993); and *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enf'd. 763 F.2d 887 (7th Cir. 1985).

With the foregoing discussion serving as a backdrop, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act by untimely providing some of the information by the Union in its February 23, 2001 letter, and failing to provide in the altogether the remainder of the information called for by this letter. First and foremost, the information requested by the Union appears to be relevant and presumptively so because the data appears to relate clearly to wages and other terms and conditions of employment for unit employees. Moreover, in my view, the information sought generally conforms to the type of information a newly certified exclusive bargaining representative would want and need to perform its representational duties and to facilitate the collective-bargaining process especially in the initial stages of the parties' relationship. Items 1-3 certainly fall within this category. Items 4 and 5 also are highly pertinent to the Union's representation function and roles. One needs no reminder that this instant litigation is replete with allegations of allegedly improper discipline imposed on union adherents for "talking" by the Respondent in the aftermath of the Union's victory up to and including the period covered by the letter. The Union's need to know the Company's discipline record under the facts and circumstances of this case could not be more compelling. Regarding the Union's request for copies of initial contracts of less than 2 years, Madden credibly testified that this request was predicated on the Respondent's advocacy of a 1-year contract or less than 2-year contract. Certainly, Madden, who had significant experience in the collective-bargaining arena, was acting as a responsible representative of the new unit, in my view, to request copies of such unusual (to him) contractual agreements.

I have considered the Respondent's arguments and would find them without merit. First, if the Respondent had indeed provided information, updated or otherwise, of its wage struc-

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information contained in the contracts and the representational functions of the union; and that the union's general claim of relevancy was insufficient to establish relevancy).

Generally, however, information concerning terms and conditions of employment of the bargaining unit employees is deemed by the Board as "so intrinsic to the core of the employer-employee relationship that the presumption will apply." *York International Corp.*, 290 NLRB 438 (1988).

ture, employee seniority lists and associated wages, and the wage increases given to the unit employees, then it would have been a simple matter to adduce its prior production at the hearing. It does not suffice, in my mind, to claim compliance and question the credibility of the union representative and then not produce that which the Company claims to have provided. Moreover, the list of employees, while somewhat in compliance, was not timely provided.

I also find unconvincing the Respondent's claim of entitlement to withhold documents because the Union failed to provide certain documents to it. The duty to bargain in good faith to produce relevant information does not rest on this type of tit for tat. Moreover, the Union ultimately was charged with a violation by the Respondent for failing to provide it with information, and a settlement with the Region was reached. That the Respondent did not join in the settlement does not allow it to avoid its own responsibilities under the Act.

In likewise, I find unpersuasive the Respondent's argument, that the Union's request for "talking" disciplines was an improper bad-faith effort to gather information for purposes of buttressing an unfair labor practice. Under the circumstances of this litigation, excessive talking was a major component of the Respondent's complaints against the union adherents after the election. Madden, as the unit representative, acted in the interests of the employees by requesting so-called talking related disciplines to evaluate the complaints of the affected employees. That these or like charges were levied against the Respondent eventually does not justify its refusal to provide this information.

#### CONCLUSIONS OF LAW

1. Saginaw Control and Engineering, Inc., the Respondent, is an employer engaged in commerce within the meaning of the Act.

2. United Steelworkers of America, AFL-CIO, the Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining in its employee handbook and enforcing an overly broad no-solicitation/no-distribution rule against its employees, the Respondent violated Section 8(a)(1) of the Act.

4. By threatening its employees with physical harm and unspecified adverse actions in retaliation for their activities, sympathies, and support of the Union, the Respondent violated Section 8(a)(1) of the Act.

5. By telling its employees they could not discuss the Union during working hours while allowing discussion of other non-work-related topics, the Respondent violated Section 8(a)(1) of the Act.

6. By soliciting employees to persuade other employees to vote against the Union, the Respondent violated Section 8(a)(1) of the Act.

7. By coercively interrogating employees with respect to their support for the Union, the Respondent violated Section 8(a)(1) of the Act.

8. By creating the impression that its employees' union activities were under surveillance, the Respondent violated Section 8(a)(1) of the Act.

9. By telling its employees they were or had become poor workers and/or bad employees because of their involvement with and support of the Union, the Respondent violated Section 8(a)(1) of the Act.

10. By threatening employees with a reduction in overtime work hours and/or transfer to another department because of their support of or involvement with the Union, the Respondent violated Section 8(a)(1) of the Act.

11. By surveilling employees and telling them that the Company knew of their support of the Union and they were in fact union supporters, the Respondent violated Section 8(a)(1) of the Act.

12. By advising employees to refrain from associating with union activists, the Respondent violated Section 8(a)(1) of the Act.

13. By disparately enforcing an overly broad no-solicitation/no-trespassing rule against employees supportive of the Union while not enforcing this rule against employees opposed to the Union, the Respondent violated Section 8(a)(1) of the Act.

14. By coercively instructing employees not to converse with supporters of the Union and informing them that the Union would no longer represent them in the near future, the Respondent violated Section 8(a)(1) of the Act.

15. By implying to employees that their wearing of a union T-shirt could or would have a detrimental impact on their performance evaluations, the Respondent violated Section 8(a)(1) of the Act.

16. By issuing a notice/letter to its employees informing them that they were required to report for work regardless of a strike if they valued their employment and telling them if they do not report for work during a strike or did not participate in picketing, they would be considered to be on strike and subject to permanent replacement, the Respondent violated Section 8(a)(1) of the Act.

17. By requiring employees to remove posters supportive of the Union while disparately allowing other nonunion posters and materials to remain posted, the Respondent violated Section 8(a)(1) of the Act.

18. By discriminatorily issuing a written discipline to employee Greg Kennedy on or about June 21, 2000, the Respondent violated Section 8(a)(3) and (1) of the Act.

19. By discriminatorily issuing written disciplines to employees Nick Herzberg, Pat Maziarz, and Wayne Tomberg on or about August 4, 2000, the Respondent violated Section 8(a)(3) and (1) of the Act.

20. By discriminatorily denying daily overtime work opportunities to employee Greg Kennedy since about August 2, 2000, and, since September 2000, denying Saturday overtime opportunities to Kennedy, the Respondent violated Section 8(a)(3) and (1) of the Act.

21. By discriminatorily issuing to employee Ronald Martin on January 11, 2001, a performance evaluation which adversely impacted his opportunity for a pay increase, the Respondent violated Section 8(a)(3) and (1) of the Act.

22. By discriminatorily issuing to employee Derek Dukarski on or about September 1, 2000, a performance evaluation

which adversely impacted his opportunity for a pay increase, the Respondent violated Section 8(a)(3) and (1) of the Act.

23. By discriminatorily issuing to employee Steve Coughran on September 28, 2000, a performance evaluation which adversely impacted his opportunity for a pay increase, the Respondent violated Section 8(a)(3) and (1) of the Act.

24. By discriminatorily issuing to employee Greg Kennedy on about October 16, 2000, a performance evaluation which adversely impacted his opportunity for a pay raise, the Respondent violated Section 8(a)(3) and (1) of the Act.

25. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees including coordinators, programmers, draftsmen, shipping clerks, warehouse employees and truck drivers employed by the Respondent at its facility located at 95 Midland Road, Saginaw, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

26. At all times material, the Union has been the exclusive collective-bargaining representative of all the employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

27. By withdrawing recognition from the Union on June 18, 2001, based on unlawful solicitations of signatures and petitions to decertify the Union prior to the expiration of the certification year in Case 7-RC-21809, and refusing to bargain with the Union thereafter as the bargaining representative of the employees in the unit described above, the Respondent violated Section 8(a)(5) and (1) of the Act.

28. By withdrawing recognition from the Union on July 18, 2001, despite the existence of a number of unremedied unfair practices occurring within the certification year, the Respondent violated Section 8(a)(5) and (1) of the Act.

29. By unilaterally and without notice to the Union and/or giving the Union an opportunity to bargain, granting a wage increase to unit employees, increasing the starting rate for new unit employees and revising its merit evaluation system for unit employees, all mandatory subjects for purposes of collective bargaining, on or about June 19, 2001, the Respondent has refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

30. By unilaterally and without notice to the Union and/or giving the Union an opportunity to bargain, reducing the working hours of and relocating certain unit employees (mandatory subjects for purposes of collective bargaining) since about January 2001, the Respondent has refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

31. By failing and refusing since about February 23, 2001, to furnish timely and/or completely the Union with the following relevant information requested by the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

(a) A current, up-to-date seniority list for all bargaining-unit employees.

(b) A current, up-to-date wage structure and list of the wage the Company currently pays to each bargaining-unit employee.

(c) A list of every bargaining unit employee whom the Company has decided to give a raise to (and in what amount) since June 1, 2000.

(d) A list of all employees the Company has disciplined, in whatever manner or degree, for the offense of "talking" or any similar offense, since January 1, 1996. Provide supporting documentation as well.

(e) A copy of any first contract, collective-bargaining agreements in the manufacturing sector, of which the Company is aware and to which the Company has access, that has a duration of less than 2 years.

32. By the aforesaid conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

33. The Respondent has not violated the Act in any other way, manner, or respect.

#### REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act and post the appropriate notice to its employees.

It is recommended that the Respondent rescind the written disciplines issued to employees Greg Kennedy, Nick Herzberg, Pat Maziarz, and Wayne Tornberg; remove any reference to the

disciplines of Greg Kennedy, Nick Herzberg, Pat Maziarz, and Wayne Tornberg from all of the Respondent's records; and make Kennedy, Ronald Martin, Derek Dukarski, and Steve Coughran whole for any loss of earnings and benefits they may have suffered as a result of the Respondent's discrimination against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It is further recommended that the Respondent rescind the overly broad no-distribution/no-solicitation rule contained at page 25 of its employees' handbook; issue nondiscriminatory performance evaluations with any appropriate wage increases to employees Kennedy, Martin, Dukarski, and Coughran, and make them whole for any loss of earnings consistent with the Board authorities cited above.

It is further recommended that the Respondent recognize and, upon request, meet and bargain with the Union as the exclusive collective-bargaining representative of the employees of the unit with respect to all mandatory subjects for purposes of collective bargaining as determined; provide the information requested in the Union's February 23, 2001 letter to the Respondent; and make all unit employees whole who have suffered any losses in earnings and benefits because of reduction of hours and/or transfer or relocation to other departments, with interest thereto consistent with the aforementioned Board authorities.

[Recommended Order omitted from publication.]